

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F505440

DAVID STOBER, Employee	CLAIMANT
SUPERIOR INDUSTRIES, Employer	RESPONDENT
CROCKETT ADJUSTMENT COMPANY, Carrier	RESPONDENT

OPINION FILED JUNE 14, 2006

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

Claimant represented by JASON WATSON, Attorney, Fayetteville, Arkansas.

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

STATEMENT OF THE CASE

On May 17, 2006, the above captioned claim came on for a hearing at Springdale, Arkansas. A pre-hearing conference was conducted on August 3, 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 relationship of employee-employer existed between the parties on May 8, 2004.
3. The claimant sustained a compensable injury to his low back on May 8, 2004.

At the time of the hearing the parties agreed to stipulate that claimant earned sufficient wages to entitle him to compensation at the rate of \$392.00 per week for temporary total disability benefits.

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

1. Temporary total disability benefits from May 8, 2004 through a date yet to be determined.
2. Additional medical subsequent to August 25, 2004.
3. Alternatively, permanent partial disability benefits.
4. Attorney fee.

At the time of the hearing claimant clarified his request for temporary total disability benefits to include the dates of July 24, 2004 through August 19, 2004, and again from August 22, 2004 through a date yet to be determined. Claimant also acknowledged at the hearing that Blue Cross/Blue Shield of California has paid some medical benefits and that claimant drew short-term disability benefits from approximately July 24, 2004 through November 25, 2004 at the rate of \$185.00 per week.

The claimant's contentions as set forth in his pre-hearing questionnaire are as follows: "The claimant contends that he is entitled to additional temporary total disability and related medical as a result of his compensable low back injury. It is anticipated that claimant will have some permanent impairment. That based upon the denial the claimant's attorney is entitled to a controverted attorney fee."

The respondents' contentions as set forth in their pre-hearing questionnaire are as follows: "Respondents contend the claimant sustained a minor back strain resulting solely in muscle spasms. The MRI conducted in July of 2004 reflected degenerative conditions and therefore the claim was controverted at that time. Respondents contend that the claimant had a minor back strain which is resolved and is entitled to no additional benefits."

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 August 3, 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 entitle him to compensation at the rate of \$392.00 per week for temporary total disability benefits is also hereby accepted as fact.

3. Claimant has failed to prove by a preponderance of the evidence that he is entitled to any additional compensation benefits as a result of his May 8, 2004 compensable injury.

FACTUAL BACKGROUND

The claimant is a 49-year-old high school graduate who attended three years of vocational school. Claimant also served ten years in the Marine Corps and received an honorable discharge.

According to claimant's own testimony and the medical record submitted into evidence, the claimant had a history of low back pain which had existed for several years, at least as far back as 1997. At that time the claimant was seeking medical treatment from Dr. Clary for complaints of low back pain and pain in his left hip.

Claimant began working for the respondent on August 9, 1993, primarily working in mold changing. The parties have stipulated that claimant suffered a compensable injury to his back on May 8, 2004 while claimant was changing molds. After reporting his injury claimant was sent by the respondent to Dr. Moffitt that same day. In a report of May 8 Dr. Moffitt noted that claimant was suffering from back pain which radiated down his left leg. Dr. Moffitt diagnosed claimant's condition as a muscular lumbar strain, provided medication, and released claimant to return to work with restrictions. Claimant returned

to work for respondent and returned to Dr. Moffitt for a follow-up evaluation on May 14, 2004. Dr. Moffitt's medical report indicates that claimant's condition is improved with him suffering no significant pain. Dr. Moffitt released the claimant to full duties and made no return appointment.

Claimant denies that he had improved between his visits with Dr. Moffitt. Claimant did return to work for the respondent and did not seek any additional medical treatment for his back until he saw Dr. Cathy Clary, his family physician, on July 23, 2004. Dr. Clary ordered physical therapy and an MRI scan which was read by the radiologist as showing degenerative disc disease and a protrusion at the L3-4 level with no disc herniation. Claimant was subsequently seen by Dr. Blankenship who interpreted the MRI scan as revealing a herniated disc. Dr. Blankenship recommended steroid injections which had previously been scheduled with Dr. Cannon. The injection performed by Dr. Cannon provided no benefit to claimant and as a result Dr. Blankenship has indicated that claimant's condition is unlikely to improve without surgery.

The respondent originally accepted this claim as compensable and paid for medical treatment claimant received from Dr. Moffitt. Claimant has filed this claim contending that he is entitled to additional medical treatment for his May 8, 2004 compensable injury as well as temporary total disability benefits.

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). Specifically, claimant has the burden of proving by a preponderance of the evidence that he is entitled to additional medical treatment for a compensable injury. *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 failed to meet his burden of proof.

As previously noted, claimant was originally evaluated by Dr. Moffitt on May 8, 2004 and was diagnosed as suffering from a muscular lumbar strain. Claimant was given medication and released to return to work with restrictions. Claimant was next evaluated by Dr. Moffitt on May 14, 2004 and Dr. Moffitt's notes of that date reflect that claimant was doing better with no significant pain. Dr. Moffitt noted that claimant's condition had improved and released claimant to full duties with no return appointment. After this visit with Dr. Moffitt claimant returned to work for respondent performing his regular job duties. However, claimant denies that his condition had improved at the time of his visit with Dr. Moffitt on May 14 and also testified that even though he returned to work he was still in pain.

Claimant's family physician is Dr. Cathy Clary. Dr. Clary's medical report of July 6, 2004 indicates that claimant was seen at that time following a hospital admission for cellulitis in his right knee. Even though claimant testified that he continued to suffer from back pain after his May 14, 2004 release by Dr. Moffitt, Dr. Clary's notes of July 6, 2004 do not mention any complaints of low back pain, only complaints involving the cellulitis.

The next medical record containing complaints of back pain is Dr. Clary's medical report of July 23, 2004. That report indicates that claimant presented for evaluation of low back pain with an onset of less than one week. Dr. Clary's medical report does not contain a history of claimant's May 8, 2004 injury.

Also admitted into evidence is a physical therapy clinical record signed by Dr. Clary and Ben Peszka, a physical therapist, with a report date of July 27, 2004. That report indicates that claimant gave a date of onset of his low back pain as of July 20, 2004. The report does indicate that claimant works in the wheel building industry and does a lot of lifting, but does not mention a work-related injury in May 2004.

In support of his contention that he is entitled to additional medical treatment for his compensable injury, claimant relies in part upon the opinion of Dr. James Blankenship, neurosurgeon. Dr. Blankenship opined by report and at his deposition that he believes that claimant's ongoing complaints and his need for additional medical treatment is directly related to the May 8, 2004 injury. Dr. Blankenship testified that his findings were consistent with claimant's complaints of back pain immediately after the May 8 injury. However, while Dr. Blankenship did not change his opinion, he nevertheless admitted after he was informed of subsequent medical records indicating an onset date in July 2004 that it was possible that the claimant's complaints were related to a new event. Specifically, Dr. Blankenship testified that he could not state within a reasonable degree of medical certainty whether a new event occurred or if the pain in July 2004 was simply a return of his prior May 2004 pain.

Q. And that might be consistent with the fact that he had very little pain on May 14th and continued to work and then quit approximately July of '04 because there was a new incident somewhere along the line?

A. Well, without - - without knowing if there was a new incident, it is impossible for me to say.

Q. Sure.

A. It's possible that a new event happened or it's possible that he had a return of his pain that was there before.

Q. You just know there is no way that you can say within a reasonable degree of medical certainty?

A. That's right.

Q. But if the records are indeed true then, that may lead to the fact that there was some type of incident if he said date of onset July 20th, 2004, another incident?

A. It's possible. (Emphasis added.)

Arkansas Workers' Compensation law requires the claimant to prove by a

preponderance of the evidence that they are entitled to additional medical treatment for their compensable injury. Here, after claimant's compensable injury he was released by Dr. Moffitt on May 14, 2004 with his condition improved and no significant pain. Claimant returned to work for the respondent at full duty subsequent to that date and apparently was evaluated by Dr. Clary, his family physician, on July 6, 2004 following a hospital admission for cellulitis. Dr. Clary's medical report contains no notation of any low back complaints at that time. The next medical report reflecting back complaints is Dr. Clary's medical report of July 23, 2004. However, Dr. Clary's notes do not mention the May 8, 2004 injury, but instead reflect that claimant's onset of back pain had occurred less than one week earlier. Finally, the report of Dr. Clary and the physical therapist dated July 27, 2004 lists the onset of claimant's back complaints having occurred on July 20, 2004. Although the report indicates that claimant does work in the wheel building industry and did a lot of lifting, the report makes no mention of the May 8, 2004 injury.

Based upon the foregoing evidence, I find that claimant has failed to prove by a preponderance of the evidence that he is entitled to additional medical treatment for his compensable injury.

Based upon this same evidence, I also find that claimant is not entitled to additional temporary total disability benefits for his injury. In order to be entitled to temporary total disability benefits claimant has the burden of proving by a preponderance of the evidence that he remains within his healing period for his compensable injury 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). Here, I find that claimant has failed to prove by a preponderance of the evidence that he remained within his healing period for his compensable injury subsequent to May 14, 2004.

Finally, I find that claimant is not entitled to permanent partial disability benefits as a result of his compensable injury. Dr. Moffitt stated in his report of May 14, 2004 that

claimant had suffered no permanent impairment as a result of his compensable injury. Accordingly, I find that claimant is entitled to no permanent disability benefits as a result of his compensable injury.

ORDER

Claimant has failed to prove by a preponderance of the evidence that he is entitled to additional medical treatment, temporary total disability benefits, or permanent disability benefits as a result of his May 8, 2004 compensable low back injury. Therefore, his claim for compensation benefits is hereby denied and dismissed.

IT IS SO ORDERED.

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE