

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F511678

ROY TONEY, EMPLOYEE

CLAIMANT

**DOLLAR GENERAL STORE,
SELF-INSURED EMPLOYER**

RESPONDENT

_____ **OPINION FILED DECEMBER 12, 2006**

Hearing before Administrative Law Judge Barbara W. Webb on September 13, 2006, in Little Rock, Pulaski County, Arkansas.

Claimant represented by Mr. Kenneth A. Olsen, Attorney at Law, Little Rock, Arkansas.

Respondents represented by Ms. Betty J. Demory, Friday, Eldredge & Clark, Attorneys at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

The above-styled claim came on for hearing in Little Rock, Arkansas, on September 13, 2006. A prehearing telephone conference was held in connection with this claim on August 7, 2006. By agreement of the parties, the stipulations applicable to this claim are as follows:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The employer/employee relationship existed on June 16, 2005, when claimant filed a claim for a work-related injury, which was accepted as compensable.
3. The claimant's average weekly wage was \$280.00, which would entitle him to a compensation rate of \$187.00 for temporary total disability.

4. Respondents have paid the claimant's medical expenses through his last visit with Dr. Rosenzweig, which was December 20, 2005.

By agreement of the parties, the issues presented at the hearing are as follows:

1. Claimant's entitlement to additional medical benefits.
2. Whether claimant reached maximum medical improvement as of December 20, 2005.
3. Alternatively, claimant's entitlement to permanent partial disability benefits based on an impairment rating of 7%.
4. Controversion and attorney's fees.

The record consists of a transcript of the September 13, 2006 hearing, containing the witness testimony of Roy Toney, Commission Exhibit 1 (the Pre-hearing Order); Claimant's Exhibit No. 1 (March 10, 2006 letter); Respondent's Exhibit 1 (Medical records); Respondent's Exhibit 2A (video) and 2B (video). In addition, Respondent's Exhibit 3, consisting of the September 12, 2006 deposition transcript of Kelly Hendrix have been blue-backed and incorporated into the record by reference.

DISCUSSION

The claimant contends he is entitled to temporary total disability benefits from the date of disability through a date yet to be determined, as well as continuing medical treatment. In the alternative, claimant contends he is entitled

to permanent partial disability benefits based on a 7% impairment rating. Respondent has controverted claimant's entitlement to additional benefits.

The respondent contends that the claimant has been provided all appropriate benefits to which he is entitled. Specifically, respondent paid for claimant's medical expenses and returned the claimant to light-duty employment. Respondent contends claimant has reached maximum medical improvement as of December 20, 2005. Respondent contends that the additional treatment sought and impairment rating are due to a pre-existing condition.

1. Additional Medical Treatment

The claimant argues that he is entitled to additional medical treatment in light of the recommendation of Dr. Rosenzweig that he seek additional physical therapy and a second examining opinion to evaluate the protrusion at L4-5 and L5-S1 creating impingement on the L5 and S1 nerve roots.

Ark. Code Ann. § 11-9-508 states that employers must provide all medical treatment that is reasonably necessary for the treatment of a compensable injury. What constitutes reasonable and necessary treatment under the statute is a question of fact for the Commission. *Ganksy v. Hi-Tech Engineering*, 325 Ark. 163, 924 S.W.2d 790 (1996); *Geo Specialty Chem., Inc. v. Clingan*, 69 Ark. App. 369, 13 S.W.3d 218 (2000). On the other hand, respondents are responsible only for medical services which are causally related to the compensable injury. Post-surgical improvement is a relevant consideration in

determining whether surgery was reasonable and necessary. *Winslow v. D & B Mech. Contractors*, 69 Ark. App. 285, 13 S.W.3d 180 (2000).

In the instant case, the medical evidence in this case indicates that Toney was responding to the initial physical therapy. On October 13, 2005, Dr. Rosenzweig recommended that the claimant undergo a round of therapy to address mobility and flexibility. He further noted that the claimant had been terminated from his job due, in part, to confusion in communication between the doctor's staff, management, and the claimant. On October 31, 2005, Dr. Rosenzweig referred the claimant to therapy. On November 21, 2005, Rosenzweig notes that physical therapy was denied to the claimant by the carrier but that he believed that therapy would be helpful to facilitate Toney's recovery. In addition, Dr. Ward, a physician which is board certified in Physiatry, notes on March 10, 2006, that he examined the claimant's physical therapy records and "sees absolutely no reason why this patient should be denied further physical therapy including continued modalities and traction for at least 12 more in-clinic visits." He further notes that it is routine for patients with disc problems who show improvement with initial therapy to have one to three months of therapy.

Based on the clear weight of the medical evidence in this case from the claimant's treating physicians, I find that an additional course of physical therapy consisting of 12 more in-clinic visits is reasonable and necessary.

Respondents contend that any further need for medical treatment is related to a pre-existing condition. However, even if a pre-existing condition is

also a causal factor of the claimant's need for medical treatment, the claimant has met his burden of proof if he nevertheless shows that the compensable injury bears some causal relation to the need for treatment. *General Electric Railcar Servs v. Hardin*, 62 Ark. App. 120, 969 S.W.2d 667 (1998); *Pearline Williams v. L & W Janitorial, Inc.*, 85 Ark. App. 1, 145 S.W.3d 383 (2004) *Scott v. Middleton Drywall*, 2005 AWCC 22 (Feb.9, 2005). In this case, Dr. Rosenzweig diagnosed the claimant with an acute disc herniation on chronic disease. This diagnosis was confirmed with an MRI and myelogram CT. Although the claimant reported prior back problems and tests reflect degenerative changes, the claimant's problems had been asymptomatic for approximately four years until the work injury on June 16, 2005. See, *Davis v. Helena Chemical Co.*, Full Commission Opinion filed August 3, 1999 (D406121); *Jerry Hambelton v. Guy King & Sons, Inc. & Bituminous Casualty Corp.*, Full Commission Opinion filed February 22, 2001 (E904812).

Claimant also seeks a second examining opinion of his back based on Rosenzweig's recommendation in light of the fact that Toney responded poorly to the conservative treatment, including spinal injections. Although Rosenzweig opined that claimant was a candidate for a 7% impairment as a result of the claimant's disc herniation based on the AMA Guide in his report dated December 20, 2005, it is clear from the report that further evaluation is needed.

Based on the preponderance of the credible medical evidence in this case, I find that claimant is entitled to a second examining opinion to evaluate the protrusion at L4-5 and L5-S1 creating impingement on the L5 and S1 nerve roots.

2. Additional Indemnity Benefits

At the hearing, Claimant withdrew his request for additional temporary total disability benefits. Moreover, it is undisputed that claimant returned to light duty work through August 2005 until his termination and continues working a part-time job within his limitations.

3. Controversion

Based on my award of medical benefits only, I find that claimant's attorney is not entitled to a statutory attorney's fee.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The employer/employee relationship existed on June 16, 2005, when claimant filed a claim for a work-related injury, which was accepted as compensable.
3. The claimant's average weekly wage was \$280.00, which would entitle him to a compensation rate of \$187.00 for temporary total disability.
4. Respondents have paid the claimant's medical expenses through his last visit with Dr. Rosenzweig, which was December 20, 2005.

5. That the additional physical therapy and second examining opinion as recommended by Dr. Rosenzweig are reasonable and necessary medical procedures in connection with the claimant's compensable injury.

6. Based on the preponderance of the credible medical evidence in this case, I find that claimant is entitled to a second examining opinion to evaluate the protrusion at L4-5 and L5-S1 creating impingement on the L5 and S1 nerve roots by a physician designated and approved by all of the parties. If the parties cannot reach an agreement as to the designated physician, a hearing will be held upon written request of the parties.

7. Claimant is not entitled to an attorney's fee on the medical benefits awarded herein.

AWARD

The respondents are hereby directed and ordered to pay medical benefits in accordance with the findings of fact and conclusions of law set forth herein. All other issues, including permanent partial disability, will be reserved for future proceedings in this case.

IT IS SO ORDERED.

BARBARA WEBB
Administrative Law Judge_