

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NOS. F405530 & F508848

MICHAEL WHITED,
EMPLOYEE

CLAIMANT

MILLBROOK DISTRIBUTION SERVICES,
EMPLOYER

RESPONDENT

ATLANTIC MUTUAL INSURANCE,
INSURANCE CARRIER

RESPONDENT NO. 1

ARGONAUT INSURANCE COMPANY,
INSURANCE CARRIER

RESPONDENT NO. 2

OPINION FILED APRIL 26, 2006

Hearing conducted before ADMINISTRATIVE LAW JUDGE MARK
CHURCHWELL, in Harrison, Boone County, Arkansas.

The claimant was represented by HONORABLE C. MICHAEL WHITE,
Attorney at Law, North Little Rock, Arkansas.

Respondent no. 1 was represented by HONORABLE JOHN D. DAVIS,
Attorney at Law, Little Rock, Arkansas.

Respondent no. 2 was represented by HONORABLE DAVID C.
JONES, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above-styled claim on
February 2, 2006 in Harrison, Arkansas. A prehearing order
was entered in this case on December 14, 2005. This
prehearing order set out the stipulations offered by the
parties and outlined the issues to be litigated and resolved
at the present time. A copy of this prehearing order was
made Commission's Exhibit No. 1 to the hearing record.

The following stipulations were submitted by the parties either in the prehearing order or at the start of the hearing and are hereby accepted:

1. The employer-employee-carrier relationship existed among claimant, respondent, and respondent no. 1 on February 9, 2004.
2. The employer-employee-carrier relationship existed among claimant, respondent, and respondent no. 2 on August 8, 2005.
3. Claimant sustained a compensable gradual onset back injury on February 9, 2004, which respondent and respondent no. 1 accepted and paid benefits on.
4. Respondent no. 1 and respondent no. 2 controvert claimant's August 8, 2005 claim.
5. Claimant earned sufficient wages in 2004 and in 2005 to be entitled to the maximum compensation rates in effect for workers' compensation disability benefits in both of those years.

By agreement of the parties, the issues to be litigated and resolved at the present time were limited to the following:

1. Whether claimant's August 8, 2005 incident involving his back constitutes one of the following: either a new gradual onset or specific incident compensable injury; an aggravation of his February 9, 2004 compensable injury; or a recurrence of his February 9, 2004 compensable injury.
2. Whether claimant is entitled to medical benefits for his August 8, 2005 injury.
3. What is claimant's average weekly wage?
4. Whether claimant is entitled to temporary total disability benefits from August 9, 2005 to a date yet to be determined.
5. Whether claimant is entitled to an attorney's fee.

The record consists of the two volume February 2, 2006 hearing transcript and the exhibits contained therein.

DISCUSSION

The claimant has been employed by the respondent, Millbrook Distribution Services, since April of 1998 as a truck driver. For some loads, the claimant is required to also unload the freight. Unloading freight can involve dragging pallets onto the trailer, and then loading the pallets for removal from the truck.

The claimant first developed some degree of back problems in 1999. After a short period of conservative treatment, the claimant returned to work and did not receive any additional medical treatment until he sustained an admittedly compensable gradual onset back injury and sought additional treatment starting in February of 2004.

Although the claimant returned to work without ongoing medical treatment between 1999 and February of 2004, he did experience some degree of ongoing back problems. During the course of his treatment in February of 2004, the claimant underwent an MRI of the lumbar spine on February 19, 2004, which indicated a left L5-S1 herniated disk with left S1 nerve root displacement. Dr. Ron Williams performed a left L5-S1 microdiskectomy on May 13, 2004.

The claimant underwent a functional capacity evaluation on July 6, 2004, and was determined to be capable of returning to work driving trucks and lifting up to 85 pounds. Dr. Williams released the claimant from his care on July 13, 2004, and later assigned the claimant a 10% impairment rating to the body as a whole which the respondents paid.

The claimant returned to driving for Millbrook Distribution Services until approximately August 8, 2005.

On August 7, 2005, the claimant drove a truck loaded with freight to Nashville, Georgia. After sleeping for a period of time, the claimant began unloading the truck at approximately 2 a.m. on August 8, 2005 and finished before noon. The claimant had awakened that morning with a stiff back, as was usual, but his back began to feel worse as he went along unloading the truck that day.

During the course of subsequent treatment in August of 2005, the claimant underwent another MRI and was again seen by Dr. Williams. Dr. Williams concluded that the claimant's symptoms since August 8, 2005 were caused by twisting the L5 nerve against scar tissue that the claimant developed from the 2004 surgery. Dr. Williams testified that this type of nerve injury usually responds to conservative treatment for the nerve inflammation. Consistent with his deposition testimony, Dr. Williams prescribed a lumbar epidural steroid injection and out-patient physical therapy five days per week for two weeks, followed by a return office visit.

However, both Atlantic Mutual Insurance and Argonaut Insurance refused to authorize the claimant's additional treatment. The claimant remained off work as of the February 2, 2006 hearing.

1. Aggravation/recurrence/apportionment

An aggravation is a new injury resulting from an independent incident. Farmland Ins. Co. v. Dubois, 54 Ark. App. 141, 923 S.W.2d 883 (1996). An aggravation, being a new injury with an independent cause, must meet the requirements for a compensable injury. Ford v. Chemipulp Process, Inc., 63 Ark. App. 260, 977 S.W.2d 5 (1998). A recurrence is not a new injury but merely another period of incapacitation resulting from a previous injury. Atkins Nursing Home v. Gray, 54 Ark. App. 125, 923 S.W.2d 897 (1996). A recurrence exists when the second complication is a natural and probable consequence of a prior injury. Weldon v. Pierce Bros. Constr., 54 Ark. App. 344, 925 S.W.2d 179 (1996).

In addition, liability may be apportioned between carriers or between employers where a second episode results from an independent intervening cause. Aetna Ins. Co. v. Dunlap, 16 Ark. App. 51, 696 S.W.2d 771 (1985). When that occurs, the employer or carrier at the time of the most recent injury is liable only for the degree of acceleration or aggravation attributable to the most recent injury. Id. [Quoting with approval Larson, Workmen's Compensation Law, § 95.31]. Without a compensable aggravation, the Commission

cannot apportion liability. William F. Warren v. H & L Poultry Processing LLC, Full Workers' Compensation Commission, Opinion filed December 9, 2005 (F209440).

Applying these principles, a majority of the Full Commission apportioned liability between successive carriers for a single gradual onset back injury in Jordan v. Parker Furniture Co., Full Workers' Compensation Commission, Opinion filed February 27, 2004 (F110661). In Jordan, the claimant began working for the respondent-employer in 1981, and the second carrier did not go "on the risk" until May 1, 2001. The claimant's back problems became apparent shortly thereafter on May 15, 2001. The Commission apportioned liability 75% to the first carrier and 25% to the second carrier.

The Commission also apportioned liability for compensable back injuries in Rita Blasingame v. Multistaff Leasing, Full Workers' Compensation Commission, Opinion filed January 14, 2003 (F008967, F009694, & F105066). The Commission concluded that a second incident constituted an aggravation of the claimant's first back injury, and apportionment was appropriate, where the claimant had experienced a permanent increase in symptoms after the second incident.

In Bette J. Collins v. From The Heart, Inc., Full Workers' Compensation Commission, Opinion filed February 2, 1999 (E703473), the Full Commission apportioned liability between 1993 and 1996 carriers where the claimant's hand symptoms started at work in 1993 but the symptoms became much worse in 1996 with new work duties, ultimately leading to hand surgery.

In Nordin v. Big Mac Tank Trucks, Full Workers' Compensation Commission, Opinion filed July 7, 1998 (E500623 & E111402), the Full Commission found that the claimant experienced an aggravation of a 1991 back injury by a 1994 back injury and apportioned liability where (1) the 1991 injury caused two herniated disks; (2) the claimant was able to return to work after the 1991 injury; (3) after the 1994 injury a herniated disk finally made contact with the nerve root; and (4) the claimant was not able to return to work until after surgery following the 1994 injury.

In Jenkins v. Fullerton Motor Company, Full Workers' Compensation Commission, Opinion filed May 28, 1998 (E608317), the Full Commission found that a 1996 transmission lifting incident was an aggravation of a 1992 back injury and surgery where (1) a post-surgical MRI in 1993 indicated disk bulge and scar tissue; (2) these

abnormalities are capable of being aggravated; (3) the claimant became asymptomatic after the 1992 injury until the 1996 transmission incident; and (4) the claimant experienced objective muscle spasms after the 1996 transmission incident supporting the occurrence of the compensable aggravation injury.

In Cothren-Laseter v. Pulaski County Special School District, Full Workers' Compensation Commission, Opinion filed September 30, 1997 (E603873 & E603874), the claimant sustained a 1993 neck injury and underwent fusion. A majority of the Full Commission found that a subsequent 1996 neck injury was an aggravation, not a recurrence, by concluding that but for the 1996 injury, a third surgery would not have been required.

In Hawkins Construction v. Maxell, 52 Ark. App. 116, 915 S.W.2d 302 (1996), the Arkansas Court of Appeals affirmed the Commission's finding that a 1992 injury was an aggravation of a 1990 injury under circumstances where: (1) the first injury was treated with physical therapy; (2) the claimant went back to work without back trouble; (3) the 1992 incident made the claimant's back hurt much worse; and (4) the second injury required surgery.

However, the Arkansas Court of Appeals also affirmed a Full Commission decision that a 1991 lumbar injury was a recurrence of a 1999 lumbar injury in Weldon v. Pierce Bros. Constr., 54 Ark. App. 344, 925 S.W.2d 179 (1996), where: (1) the 1989 injury required a 1990 lumbar surgery; (2) the 1991 injury was diagnosed as a ligament strain and possible epidural scar; (3) no restrictions or limitations were placed on the claimant by the surgeon after the 1990 surgery; and (4) the claimant was never pain free or without back difficulties after the 1989 accident.

In the present case, I find that a preponderance of the credible evidence in the record establishes that the claimant's medical difficulties at issue in this case on and after August 8, 2005 constitute a recurrence of his February 9, 2004 compensable back injury, rather than an aggravation or new injury or a recurrence of any back problems which preexisted the admittedly compensable 2004 gradual onset back injury. In reaching this conclusion, I am persuaded that a preponderance of the evidence establishes that there are no new objective medical findings in the record establishing the occurrence of a new injury or aggravation that occurred on August 8, 2005. To the contrary, Dr. Williams' deposition testimony persuades me that the

objective findings in the August 17, 2005 MRI (scar tissue, disk height loss, and diffuse annular disk bulging) were all due to the 2004 surgery, and not to any new injury. [Joint Exhibit 2, p. 10 and 20]. Likewise, I am not persuaded by the suggestion that the claimant's current difficulties may have preexisted the 2004 injury in light of Dr. Williams' testimony that the claimant's current symptoms are caused by nerve inflammation due to scar tissue, and that the scar tissue is related to the 2004 compensable surgery.

Even if the proximity of the scar tissue to the nerve root indicated on the August 17, 2005 MRI might arguably be construed as a potential new objective finding, arguably related to a new injury on August 8, 2005, I would still nevertheless conclude that the claimant's symptoms after August 8, 2005 are a recurrence of his admittedly compensable 2004 back injury in light of the following evidence, which I find credible. First, notwithstanding Dr. Williams' belief that the claimant was experiencing no back or leg symptoms following his 2004 surgery, I find based on the credible testimony of the claimant, of Mr. Walker, of Mr. Richardson, and the claimant's father, and based on the history contained in the functional capacity evaluation performed on July 6, 2004, that the claimant did in fact

experience continuing back pain and symptoms into his left leg following the 2004 surgery and his release by Dr. Williams on July 13, 2004. [See T. 25, 74, 91, 97, 98, and Joint Exhibit 1 page 22]. I also conclude from the claimant's credible testimony that the claimant on occasions after the 2004 surgery experienced the same degree of symptom severity that he experienced on August 8, 2005, but that the symptoms have simply become more constant since that date. In addition, I am persuaded by Dr. Williams' testimony that the problems which the claimant has experienced since August of 2004, in the nature of a nerve inflammation, usually responds to conservative treatment. [Joint Exhibit 2 page 11].

In short, in the present case as in Weldon, supra., the claimant's compensable 1994 injury required surgery. Similar to Weldon, the claimant's 1995 back problems have been diagnosed as related to scar tissue. As in Weldon, Dr. Williams placed no specific restrictions or limitations on the claimant after his 2004 surgery, and as in Weldon, the preponderance of the credible evidence establishes that the claimant was never pain free or without back difficulties after his 1994 injury, and had in fact experienced pain of similar severity prior to the truck unloading at issue on

August 8, 2005. Under these circumstances, I find that a preponderance of the evidence establishes that the claimant's problems beginning in August 2005 are a recurrence of his 2004 compensable gradual onset back injury.

2. Temporary Total Disability Benefits and Medical Treatment

Temporary total disability for unscheduled injuries is that period within the healing period in which a claimant suffers a total incapacity to earn wages. Ark. State Highway & Transportation Dept. v. Breshears, 272 Ark. 244, 613 S.W.2d 392 (1981). The healing period ends when the underlying condition causing the disability has become stable and nothing further in the way of treatment will improve that condition. Mad Butcher, Inc. v. Parker, 4 Ark. App. 124, 628 S.W.2d 582 (1982).

Employers must promptly provide medical services which are reasonably necessary for treatment of compensable injuries. Ark. Code Ann. § 11-9-508(a). Injured employees have the burden of proving by a preponderance of the evidence that medical treatment is reasonably necessary for treatment of the compensable injury. Ark. Code Ann. § 11-9-705(a)(3); Jordan v. Tyson Foods, Inc., 51 Ark. App.

100, 911 S.W.2d 593 (1995). What constitutes reasonably necessary medical treatment is a question of fact for the Commission. Gansky v. Hi-Tech Engineering, 325 Ark. 163, 924 S.W.2d 790 (1996); Air Compressor Equipment v. Sword, 69 Ark. App. 162, 11 S.W.3d 1 (2000).

Medical treatment intended to reduce or enable an injured worker to cope with chronic pain attributable to a compensable injury may constitute reasonably necessary medical treatment. Tina Haskins v. TEC, Full Workers' Compensation Commission, June 20, 1991 (D704562). An employer may also remain liable for medical treatment reasonably necessary to maintain a claimant's condition after the healing period ends. Artex Hydroponics, Inc. v. Pippin, 8 Ark. App. 200, 649 S.W.2d 845 (1983).

In addition, the Full Commission explained in Wells v. Wal-Mart Associates, Full Workers' Compensation Commission, Opinion filed May 22, 2002 (W.C.C. No. F100849):

[W]e note that an injured worker is not required by law to establish a need for ongoing medical treatment through evidence of objective medical findings. Williams v. Prostaff Temporaries, 336 Ark. 510, 988 S.W.2d 1 (1999). However, we note that the presence or absence of ongoing objective pathology can be a relevant factor.

As mentioned above, in the present case Dr. Williams has proposed a course of conservative treatment, including

at least one epidural steroid injection and a period of physical therapy, in order to treat the nerve inflammation which Dr. Williams has concluded is causing the claimant's symptoms at the present time. I find that the course of conservative treatment proposed by Dr. Williams is reasonably necessary for, and causally related to, the symptoms which Dr. Williams has diagnosed as nerve inflammation due to twisting against surgically related scar tissue. Because treatment of the nerve inflammation is intended to improve the permanent nature of the claimant's nerve inflammation condition, and because the claimant has not yet had the benefit of this treatment because of the respondents' controversion of this case, I find that the claimant remained within the healing period for his compensable injury at the time of the hearing held on February 2, 2006, and he will remain within his healing period at least until he has had an opportunity to receive the conservative treatment intended to resolve the inflammation in his affected nerve.

I also find that the claimant has established by a preponderance of the evidence that he is totally incapacitated from earning wages and has been incapacitated since he returned from unloading the truck on August 8,

2005. In reaching this conclusion, I recognize that there are no medical reports in the record placing the claimant in off work status after August 8, 2005. I recognize that the claimant has not filled his prescriptions for medication from his physicians. Nevertheless, I also note that the claimant was scheduled to undergo two weeks of out-patient physical therapy five days per week, and I conclude that the claimant could not undergo physical therapy five days per week while still engaging in long haul trucking, which appears to require overnight travel during the course of the week. While Millbrook might have other routes which could accommodate the claimant undergoing physical therapy five days per week, and which might not require the claimant to unload trucks while his back heals from the nerve inflammation, these routes are not available to the claimant because of the seniority system utilized at Millbrook to assign routes. Under these circumstances, I find that the nerve inflammation, and respondent no. 1's refusal to provide the treatment to resolve that inflammation, have rendered the claimant incapacitated from earning since August 8, 2005.

I therefore conclude that the claimant was both within his healing period and totally incapacitated from earning wages beginning on August 9, 2005 through the date of the

hearing held on February 2, 2006 and continuing to a date yet to be determined.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The employer-employee-carrier relationship existed among claimant, respondent, and respondent no. 1 on February 9, 2004.

2. The employer-employee-carrier relationship existed among claimant, respondent, and respondent no. 2 on August 8, 2005.

3. Claimant sustained a compensable gradual onset back injury on February 9, 2004, which respondent and respondent no. 1 accepted and paid benefits on.

4. Respondent no. 1 and respondent no. 2 controvert claimant's August 8, 2005 claim.

5. Claimant earned sufficient wages in 2004 and in 2005 to be entitled to the maximum compensation rates in effect for workers' compensation disability benefits in both of those years.

6. The preponderance of the evidence establishes that the claimant's back problems on and after August 8, 2005 are a recurrence of his admittedly compensable gradual onset back injury sustained on February 9, 2004.

7. The claimant has established by a preponderance of the evidence that the additional conservative treatment proposed by Dr. Ron Williams is reasonably necessary to treat the nerve inflammation diagnosed as causing the claimant's current back problems.

8. The claimant has established by a preponderance of the credible evidence that he remains within his healing period and incapacitated from earning wages until he has the benefit of undergoing the additional medical treatment proposed by Dr. Williams for his nerve inflammation.

9. The claimant has therefore established by a preponderance of the evidence that he is entitled to additional temporary total disability compensation beginning on August 8, 2005, through the date of the February 2, 2006 hearing and continuing to a date yet to be determined.

AWARD

Respondent no. 1 is directed to pay benefits in accordance with the findings of fact set forth herein. All accrued sums shall be paid in a lump sum without discount and this award shall earn interest at the legal rate until paid, pursuant to A.C.A. §11-9-809, and Couch v. First State Bank of Newport, 49 Ark. App. 102, 898 S.W.2d 57 (1995), and Burlington Industries, et al v. Pickett, 64 Ark. App 67, 983

WHITED - F405530 & F508848 19

S.W.2d 126 (1998); reversed on other grounds 336 Ark. 515,
988 S.W.2d 3 (1999).

The claimant's attorney is entitled to a 25% attorney's fee on the indemnity benefits awarded herein, one-half of which is to be paid by the claimant and one-half to be paid by respondent no. 1 in accordance with Ark. Code Ann. § 11-9-715 and Death & Permanent Total Disability Trust Fund v. Brewer, 76 Ark. App. 348, 65 S.W.3d 463 (2002).

IT IS SO ORDERED.

MARK CHURCHWELL
Administrative Law Judge