

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F600340

DAROLD BRUTON, Employee	CLAIMANT
VAN BUREN PIPE COMPANY, Employer	RESPONDENT
CONSTITUTION STATE SERVICE COMPANY, Carrier	RESPONDENT

OPINION FILED AUGUST 1, 2007

Hearing before ADMINISTRATIVE LAW JUDGE GREGORY K. STEWART in Fort Smith, Sebastian County, Arkansas.

Claimant represented by EDDIE H. WALKER, JR., Attorney, Fort Smith, Arkansas.

Respondents represented by JAMES A. ARNOLD, II, Attorney, Fort Smith, Arkansas.

STATEMENT OF THE CASE

On July 9, 2007, the above captioned claim came on for a hearing at Springdale, Arkansas. A pre-hearing conference was conducted on February 21, 2007, and a pre-hearing order was filed on February 23, 2007. 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 at all relevant times.
3. The claimant sustained a compensable injury to his lumbar spine on September 1, 2005.
4. The claimant was earning sufficient wages to entitle him to compensation at the weekly rates of \$358.00 for temporary total disability benefits and \$269.00 for permanent partial disability benefits.
5. Respondents paid temporary total disability benefits through August 24, 2006.

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

1. Claimant's entitlement to temporary total disability benefits from August 25, 2006 through a date yet to be determined; alternatively, permanent partial disability benefits.
2. Additional medical.
3. Attorney fee.

At the time of the hearing the claimant withdrew and reserved his alternate contention that he was entitled to permanent partial disability benefits. As a result, the only issues to be litigated are claimant's entitlement to additional temporary total disability benefits, medical treatment, and an attorney fee.

The claimant contends that although the respondents accepted liability for his claim and paid some temporary disability and medical benefits, they now have denied the claimant's entitlement to additional benefits. The claimant contends that he is entitled to temporary total disability benefits from the date they were terminated until a date yet to be determined and reasonably necessary medical treatment. The claimant contends that his attorney is entitled to an appropriate attorney's fee.

The respondents contend that claimant reached maximum medical improvement on or before August 24, 2006; that they paid temporary total disability through August 24, 2006; and that the claimant is therefore entitled to no temporary total disability benefits. Respondents also contend they have paid all necessary medical expenses associated with the claimant's low back injury.

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 February 21, 2007, and contained in a pre-hearing order filed February 23, 2007, are hereby accepted as fact.

2. 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.

FACTUAL BACKGROUND

The claimant is a 28-year-old man who worked for the respondent as a line operator manufacturing pipe. Claimant suffered a compensable injury to his lumbar spine while unloading pipe on September 1, 2005. Claimant's initial medical treatment was in the emergency room at Sparks Hospital where he was diagnosed as suffering from a strain. Claimant was given medication, restrictions, and instructed to receive follow-up care in some two to three days. Claimant subsequently sought medical treatment from Dr. Chris Graham, a chiropractic physician, who took claimant off work for a period of time.

An MRI scan was eventually performed on claimant's lumbar spine which revealed a protrusion or herniation at the L4-5 level. As a result, claimant was referred to Dr. Blankenship, neurosurgeon. Dr. Blankenship was not happy with the images on the claimant's MRI scan and as a result ordered a repeat MRI scan to include the L5-S1 space. In addition, Dr. Blankenship also recommended that the claimant undergo a multi-level discography.

The second MRI scan of claimant's lumbar spine was performed on March 2, 2006. According to Dr. Blankenship's report of that date, the MRI scan revealed no disc herniation, neuroforaminal stenosis or central canal stenosis at the L3-4 level. In addition, the L5-S1 level was normal. However, the L4-5 level revealed a protrusion.

Dr. Blankenship subsequently performed the discogram on claimant's lumbar spine on March 20, 2006. According to Dr. Blankenship's report of March 23, 2006, while the discography did confirm that the claimant had a disc herniation at the L4-5 level, it was not the source of claimant's low back pain. Dr. Blankenship indicated that the claimant might suffer from segmental instability with a possible contribution by the facet joints. Dr. Blankenship did not feel that surgical intervention was necessary, but instead treated claimant with medication and physical therapy.

Dr. Blankenship's medical reports indicate that physical therapy and the facet joint injections were not beneficial in treatment of claimant's condition. As a result, Dr. Blankenship ordered a functional capacities evaluation of the claimant which was performed on August 1, 2006. That evaluation indicated that claimant was capable of performing medium type work with a lifting restriction of 40 pounds. Dr. Blankenship in a report dated August 16, 2006, released the claimant as having reached maximum medical improvement. Claimant was released to return to work with a 40-pound lifting restriction. It was Dr. Blankenship's opinion that claimant would not need further treatment and that no impairment rating was warranted.

Following claimant's release by Dr. Blankenship, he filed for and received a change of physician to Dr. Raben. Claimant was evaluated by Dr. Raben on February 26, 2007, at which time he recommended that claimant undergo an additional CT discography. Respondent paid for Dr. Raben's initial medical treatment but has not accepted liability for any additional treatment or testing.

As a result, claimant has filed this claim contending that he is entitled to additional medical treatment for his low back injury. In addition, claimant also requests temporary total disability benefits beginning August 25, 2006 and continuing through a date yet to be determined.

ADJUDICATION

Claimant has the burden of proving by a preponderance of the evidence that he is entitled to additional medical treatment. *Stone v. Dollar General Stores*, 91 Ark. App. 260, 209 S.W. 3d 445 (2005). What constitutes reasonably necessary medical treatment is a question of fact to be determined by the Commission. *White Consolidated Industries v. Galloway*, 74 Ark. App. 13, 45 S.W. 3d 396 (2001).

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 prove by a preponderance of the evidence that he is entitled to additional medical treatment for his compensable low back injury.

Following his compensable injury, the claimant was seen in the emergency room and subsequently by a chiropractic physician. Claimant was also referred to Dr. Lennington, a pain management specialist. In January 2006 Dr. Lennington gave claimant an epidural steroid injection. At the time of claimant's next visit with Dr. Lennington he noted that claimant's condition was 80 percent better for approximately two or three days after the injection and then the pain returned with the same severity. Dr. Lennington gave claimant a second injection on February 14, 2006. However, the medical reports indicate that the second injection provided no benefit to the claimant.

Claimant was eventually referred to Dr. Blankenship, neurosurgeon. Dr. Blankenship ordered a second MRI scan and a multi-level discography. The MRI scan indicated that claimant's L5-S1 disc was normal. In addition, with respect to the L3-4 level no disc herniations or stenosis were observed. The MRI scan did reveal that at the L4-5 level claimant had a left disc protrusion which did not appear to "efface any neural elements."

Dr. Blankenship subsequently performed the discography on March 20, 2006. In his report dated March 23, 2006, Dr. Blankenship noted that the discography confirmed

that claimant had a L4-5 disc herniation. However, it was not the source of claimant's low back complaints. Dr. Blankenship did not feel that surgical intervention was appropriate, but instead treated claimant with medication and ordered physical therapy. Dr. Blankenship also recommended facet joint injections from Dr. Cannon. Neither the physical therapy nor the injections from Dr. Cannon provided any relief to claimant's symptoms. As a result, Dr. Blankenship ordered a functional capacities evaluation of the claimant which was conducted on August 1, 2006.

A review of the functional capacities evaluation as well as Dr. Blankenship's report of August 16, 2006, indicates that there were some minor inconsistencies in the claimant's performance during the evaluation. Both of these reports indicate that claimant gave a variable effort during the physical testing. According to Dr. Blankenship: "It is a definite fact that Mr. Bruton can do more physically at times than was demonstrated during his testing." Dr. Blankenship also went on to note: "There were also minor inconsistencies to the reliability of his testing. Combining these two factors together would indicate that Mr. Bruton, at best, has an inappropriate illness behavior and is able to do more at times than he appreciates."

Based upon the evaluation, Dr. Blankenship indicated that claimant could return to work with a 40-pound weight lifting restriction. He also opined that claimant had reached maximum medical improvement; that no additional medical treatment was necessary; and that claimant had suffered no permanent impairment as a result of his compensable injury.

As previously noted, after he was released by Dr. Blankenship, claimant sought medical treatment from Dr. Raben who has recommended an additional discography. Dr. Raben stated the reasons he feels an additional discography was necessary in his deposition.

I find based on the evidenced presented that claimant has failed to prove by a preponderance of the evidence that he is entitled to additional medical treatment for his

compensable back injury. In short, I find that the opinion of Dr. Blankenship is entitled to greater weight than that of Dr. Raben. First, Dr. Blankenship has evaluated the claimant on several occasions over the course of a six month period of time. On the other hand, Dr. Raben evaluated the claimant on only one occasion. Furthermore, Dr. Blankenship himself performed the discography on the claimant and was of the opinion that it did not explain the claimant's low back pain. I believe it is also important to note that Dr. Raben was not aware of the claimant's back complaints prior to September 1, 2005, and that other than the results from the MRI scan and the discogram, Dr. Raben had not reviewed any of the medical reports from claimant's treating physicians. In fact, Dr. Raben was unaware that claimant had undergone injections by Dr. Lennington and Dr. Cannon.

It should also be noted that Dr. Raben indicated that he would recommend an additional discogram due to some confusion regarding the levels which were evaluated during the discogram performed by Dr. Blankenship. Admittedly, the discogram report by Dr. Blankenship dated March 20, 2006, refers to the L5-S1 level as opposed to L4-5. However, Dr. Blankenship explained this discrepancy in his letter dated June 5, 2007 in which he noted that the confusion was caused by the claimant's anatomy. However, it is clear from a review of Dr. Blankenship's letter that he specifically evaluated the appropriate level during the discogram he performed in March 2006. Finally, I note that the respondent offered into evidence a video of the claimant taken on February 26 and February 28, 2007. This video shows claimant driving his van, filling it with gasoline, and getting a child seat out of the van. More importantly, the video on February 28, 2007 shows the claimant squatting down on one knee talking with an individual working on a vehicle. The claimant's back is bent over for much of this video which lasts approximately six minutes.

In summary, claimant has the burden of proving by a preponderance of the evidence that he is entitled to additional medical treatment for his compensable injury. In this

particular case, Dr. Raben has recommended a second discogram. However, claimant has previously been evaluated and treated by numerous physicians with various modalities of treatment. Claimant has undergone injections from both Dr. Lennington and Dr. Cannon. Claimant has also undergone physical therapy and has been treated with medication. None of those treatments has improved or alleviated claimant's symptoms. While claimant does have a disc herniation at the L4-5 level, Dr. Blankenship opined that it was not the cause of claimant's complaints of pain based upon the results of a discogram. When various modalities of treatment did not improve claimant's condition, Dr. Blankenship ordered a functional capacities evaluation which indicated that claimant gave variable efforts during his physical testing. According to both the evaluation report and Dr. Blankenship's subsequent medical report, these factors indicate at best that claimant had an inappropriate illness behavior. As a result, Dr. Blankenship released claimant as having reached maximum medical improvement with no further treatment necessary. I find that Dr. Blankenship's opinion is credible and entitled to great weight.

Accordingly, based upon the evidence presented, 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 has failed to meet his burden of proving by a preponderance of the evidence that he is entitled to additional temporary total disability benefits. 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 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, Dr. Blankenship released the claimant as having reached maximum medical improvement as of August 16, 2006. He also released the claimant to return to work as of that date. The functional capacities evaluation which was performed

on August 1, 2006 indicated that claimant was capable of work in the medium category lifting up to 40 pounds. Based upon this evidence, claimant did not remain within his healing period and he did not suffer a total incapacity to earn wages subsequent to August 16, 2006.

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.

The respondents are ordered to pay the court reporter's charges for preparing the hearing transcript in the amount of \$271.00.

IT IS SO ORDERED.

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE