

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NOS. F502737 & F604782

BENJI S. DAVIS, EMPLOYEE

CLAIMANT

**WAL-MART ASSOCIATES, INC.,
SELF-INSURED EMPLOYER**

RESPONDENT

**CLAIMS MANAGEMENT, INC.,
INSURANCE CARRIER/TPA**

RESPONDENT

OPINION FILED OCTOBER 4, 2007

Hearing conducted before Administrative Law Judge S. Dale Douthit in Texarkana, Arkansas.

Claimant was represented by Mr. Gregory R. Giles, Attorney at Law, Texarkana, Arkansas.

The respondents were represented by Mr. Curtis L. Nebben, Attorney at Law, Fayetteville, Arkansas.

STATEMENT OF THE CASE

On July 10, 2007, the above-captioned claim came on for a hearing in Texarkana, Arkansas. A prehearing conference was conducted on May 23, 2007, and a Prehearing Order was entered on May 24, 2007. A copy of the May 24, 2007, Prehearing Order was marked as "Commission Exhibit 1" and made a part of the record, subject to any modifications made at the full hearing.

At the full hearing, the parties stipulated to the following:

- 1) The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
- 2) The employee/employer/carrier relationship existed at all relevant times including August 19, 2004, and March 8, 2005.

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- 3) The claimant's applicable weekly compensation rates on August 19, 2004, were \$162/\$154 for TTD/PPD, respectively.
- 4) The claimant's applicable weekly compensation rates on March 8, 2005, were \$163/\$154 for TTD/PPD, respectively.
- 5) Claimant sustained compensable injuries to his back on August 19, 2004.
- 6) A Change of Physician Order was entered on September 28, 2006, which named Dr. Mocek as the claimant's primary treating physician.
- 7) All issues related to permanent impairment are reserved.

The parties agreed at the full hearing the following issues would be presented for determination:

- 1) Whether claimant is entitled to additional medical treatment for his August 19, 2004, compensable injury.
- 2) Whether claimant sustained a new compensable injury or aggravation to his neck on March 8, 2005, or whether his problems are a recurrence of his August 19, 2004, compensable injury.
- 3) If the March 8, 2005, incident is deemed to be an aggravation or a new compensable injury, it must be determined whether claimant is entitled to all medical treatment associated with the March 8, 2005, incident.
- 4) Whether claimant is entitled to TTD benefits from February 27, 2007, to a date yet to be determined plus attorney's fees.

At the full hearing the claimant contended that he sustained compensable injuries on August 19, 2004, and that the problems he continues to have are associated with those compensable injuries. Claimant contends the incident on March 8, 2005, is

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merely a recurrence of the symptoms originating from his August 19, 2004, compensable injury. In the alternative, claimant contends a new compensable injury on March 8, 2005, which is either an aggravation of his preexisting condition originally sustained on August 19, 2004, or a new injury in and of itself and also compensable. Claimant further contended that the medical treatment he has received to date has been reasonable and necessary and related to his compensable injuries and the additional medical treatment he needs is also reasonable and necessary and related to the compensable injuries. Claimant further contends that respondents should be ordered to pay attorney's fees as provided by law and the claimant contends he is entitled to TTD benefits from February 27, 2007, to a date yet to be determined.

Respondents contended at the full hearing that they have paid all benefits to which the claimant is entitled that arose out of the August 19, 2004, injuries. Respondents contend the claimant did not sustain an injury arising out of and in the course of employment on March 8, 2005, including but not limited to the fact that there are no measurable and objective findings to support an injury.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing 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 claimant and to observe his demeanor, the following findings

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of fact and conclusions of law are hereby made in accordance with A.C.A. § 11-9-704:

- 1) The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
- 2) The stipulations agreed to by the parties are reasonable and hereby accepted as fact.
- 3) The claimant has not reached maximum medical improvement as a result of his August 19, 2004, compensable injury.
- 4) The claimant's need for medical treatment for his back is due to a recurrence of his symptoms caused by his stipulated August 19, 2004, compensable injury. As such the claimant is entitled to and respondents are hereby directed to pay all additional medical treatment related to the claimant's back that is contained in the record herein, as such treatment was reasonable and necessary and related to the claimant's August 19, 2004, compensable injury. In addition, claimant has proven by a preponderance of the evidence that the additional medical treatment now recommended by Drs. Mocek and Collins is reasonable and necessary and related to his compensable injury of August 19, 2004, and as such is the responsibility of the respondents.
- 5) Claimant has failed to prove by a preponderance of the evidence that he is entitled to temporary total disability benefits.

DISCUSSION

A. History

The claimant, age 32, began working for Wal-Mart on February 23, 2004, as a stocker. The parties stipulated claimant sustained compensable back injuries while working for Wal-Mart on August 19, 2004. The claimant testified as follows

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regarding the August 19, 2004, incident:

A Yes, sir, I was in the dairy cooler, I worked at the dairy section at the time. I was on the ladder in the cooler by myself and I was trying to get a box of Sunny D off the top of the shelf, which held four individual gallons, and as I pulled on the box with my right hand it stopped because of the grating, it had rectangular grating on the top of the shelf and the box had hung in the grating. As I pulled harder it wouldn't, you know, it wouldn't come loose, so I pulled on it, I just jerked on it to get it to come loose, and when I did, it just all at once come loose. And as it come off, I caught it on my forearm and the side of my face, here, and as me and the ladder went over, I caught –

Q What side of the face were you pointing to?

A The right side of my face, I caught the box on the right side of my face. And as the ladder and me went backwards, I reached up with my left hand and grabbed the shelf catching myself, and as that happened it hyper-extended my back backwards.

(T. pp. 16-17, lines 23-25 & 1-17).

The claimant testified that he immediately felt some burning in his back after the injury. Eventually the claimant reported the injury and was sent by his employer to Dr. Mike Buffington. The medical records indicate the claimant first saw Dr. Buffington on August 26, 2004, with complaints of pain down both hips and legs. Dr. Buffington's 8/26/04 report indicates muscle spasms and the claimant was prescribed Mobic, Darvocet, and Flexeril. (C. Ex. 1, pp. 1-2).

The medical records indicate the claimant continued treating with Dr. Buffington on 9/7/04, 9/16/04, 9/27/04, 10/6/04, 10/29/04, and 11/4/04 with continued

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complaints of back pain and muscle spasms. (See C. Ex. 1, pp. 3-7 & 10-25). During this period of treatment, Dr. Buffington referred the claimant to physical therapy. Dr. Buffington also recommended referral to a specialist; however, claimant testified that was never done. Dr. Buffington initially had the claimant on light duty, but on 11/4/04 returned the claimant to full duty. (C. Ex. 1, pg. 24). Dr. Buffington returned the claimant to full duty on November 4, 2004, even though his report of that date states "lab and x-ray testing and referral to specialist appropriate to today's visit instituted." (C. Ex. 1, pg. 24). Dr. Buffington also recommended claimant continue taking medications in his November 4, 2004, report.

The claimant testified he was still having the same problems with his back after Dr. Buffington released him to full duty.

Q Did you agree you were ready to be released and go back to work at that time full duty?

A No, sir, I didn't feel like I was.

Q As you had been doing your full duty job were you having problems?

A Every day, sir.

Q What was going on?

A Still, same, you know, same middle, thoracic area of my back, lower back, my legs, mainly my right leg and my right side, muscle spasms, loss of sleep, burning sensations.

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Q Were you complaining to anyone at Wal-Mart about these continuing problems you were having?

A Work and at home, yes, sir.

Q Who were you complaining to?

A I said stuff to my co-workers, and I said also to my support managers that I worked with.

Q Did the support managers offer you any additional medical care or relief?

A No, sir.

Q And you continued to do your regular job duties?

A Best I could.

(T. pp. 21 & 22, lines 21-25 & 1-22).

The medical records do not show that claimant received the additional x-rays, lab tests or specialist referral Dr. Buffington recommended in his November 4, 2004, report.

On March 8, 2005, the claimant testified he was lifting a box of queen size memory foam and irritated his back. (T. pp. 22-23, lines 23-25 & 1-18). The claimant testified the March 8, 2005, incident did not create any new symptoms other than what he was already experiencing due to his August 19, 2004, compensable injury.

Q Were the pain and problems that you're talking about after the 3-9-05, was this in an entirely different location or same location as compared to the first incident?

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A Same location, same feeling sensations, pain, muscle spasms, it just irritated it.

Q Had the pain and muscle spasms from the first episode ever entirely gone away before the second event?

A No, sir, it was still the same.

(T. pg. 24, lines 11-20).

The claimant testified that after the March 8, 2005, incident, Wal-Mart sent the claimant to Dr. Thomas Jones. The March 10, 2005, report of Dr. Jones indicates Dr. Jones assessed the claimant with upper and lower back pain and prescribed Naprosyn, Hydrocodone, and Flexeril. (C. Ex. 1, pg. 28). Claimant testified that Wal-Mart would not pay for medical treatment after this initial visit with Dr. Jones, so he went on his own back to Dr. Buffington for treatment. The medical records indicate the claimant saw Dr. Buffington after March 8, 2005, with continued complaints of back pain. Dr. Buffington's reports continue to show a recommendation to a specialist and continued prescription medications.

The claimant testified that after the March 8, 2005, event, he continued to work for Wal-Mart under regular duty, until he was terminated in July of 2005 for absenteeism. The claimant testified that his absenteeism from work was due to the severe pain he was still experiencing from his August 19, 2004, compensable injury. The claimant testified that he continued to have the same symptoms of back pain, leg

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pain and muscle spasms even after he left Wal-Mart.

The claimant began working for Tiger Mart/Baskin Robbins in August of 2005 and worked for Burger King from December 13, 2005, through April 16, 2006. After leaving Burger King, the claimant worked for PTI as a taxi driver from approximately June of 2006 until February of 2007. The claimant testified that he had to leave PTI due to his back pain and based upon Dr. Mocek's recommendation that he not drive under his current medications. The claimant testified that he never hurt his back after leaving his employment with Wal-Mart, and continued to have the same problems with his back that he had had since his August 19, 2004, compensable injury.

While working for the different employers after he left Wal-Mart, claimant continued to treat with Dr. Buffington. Dr. Buffington's April 17, 2006, report shows a recommendation for pain management; however, the claimant testified he could not afford it. Eventually, the claimant came up with enough money for an MRI of both the thoracic and lumbar spine. The thoracic MRI was normal, but the lumbar MRI had the following findings:

MRI of the lumbar spine: There is desiccation of the L3-L4 disk. There is moderate narrowing of this disk space and minimal generalized posterior disk bulging which barely effaces the anterior thecal sac. The vertebral bodies have a normal appearance. The disks are otherwise unremarkable. The conus is normally positioned. The neural exit foramen are widely patent. No area of abnormal enhancement.
Impression: Degenerative change at L3-L4 where there is disk desiccation, mild disk space narrowing and minimal posterior disk

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bulging.

(C. Ex. 1, pg. 63).

The claimant was able to see Dr. Roshan Sharma for pain management on April 26, 2006, who recommended trigger point injections (C. Ex. 1, pg. 74-75), however claimant states he could not afford the treatment.

A Change of Physician Order was issued by the Commission on September 28, 2006, making Dr. Christopher Mocek the claimant's primary treating physician. Dr. Mocek examined the claimant on October 12, 2006, and recommended three lumbar epidural steroid injections followed by physical therapy. Dr. Mocek opined that if pain persisted, a lumbar diskogram or a minimally invasive disk procedure could be necessary. Dr. Mocek diagnosed the claimant with herniated lumbar disk, lumbar radiculopathy, lumbar spine pain and lumbar muscle spasms. (C. Ex. 1, pp. 89-92). Next the claimant saw Dr. Kevin Collins in April of 2007. Dr. Collins' April 2, 2007, report states "he is certainly not at MMI and certainly needs further treatment." Dr. Collins stated "I concur with the recommendations for the diskogram and if nothing more, possibly an EMG to rule out radiculopathy." (C. Ex. 1, pp. 128-130). Dr. Collins did give the claimant a permanent impairment rating for his back even though Dr. Collins specifically stated that the claimant was not at maximum medical improvement. The claimant seeks benefits for the medical treatment he has received

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to date and for the further treatment now recommended. Claimant also requests temporary total disability benefits and attorney's fees.

B. Adjudication

The claimant contends that the problems he continues to have are associated with his original August 19, 2004, compensable back injuries. Claimant first contends his current problems are a recurrence of his symptoms attributable to the August 19, 2004, compensable injury, but in the alternative, claimant contends the March 8, 2005, incident aggravated his preexisting condition or was a new compensable injury in and of itself. In Maverick Transportation v. Buzzard, 69 Ark. App. 128, 10 S.W.3d 467 (2000) the Arkansas Court of Appeals discussed the difference between aggravation and a recurrence as it relates to Workers' Compensation Law. The Court stated:

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). 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 nature and probable consequence of a prior injury. Weldon v. Pierce Bros. Const., 54 Ark. App. 344, 925 S.W.2d 179 (1996).

The test to determine whether a subsequent episode is a recurrence or an aggravation is whether the subsequent episode was a natural and probable result of the first injury or if it was precipitated by an independent intervening cause. Bearden Lumber Co. v. Bond, 7 Ark. App. 65, 644 S.W.2d 321 (1983).

The facts contained in the record indicate the claimant's back problems are

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simply a recurrence of his August 19, 2004, compensable injury. A thorough review of the medical records clearly shows the claimant has consistently had the same symptoms since his August 19, 2004, stipulated compensable injury. I recognize that Dr. Buffington released the claimant to work on November 4, 2004, however; that same report that returns the claimant to work also recommends more diagnostic testing and a referral to a specialist. (C. Ex. 1, pp. 24-25). Those things were never done, and the claimant continued to experience back problems. Dr. Buffington's November 4, 2004, report shows the claimant was not at MMI at that time because more treatment was needed.

Subsequent to the claimant returning to work for Wal-Mart, he continued to have the same problems and on February 9, 2005, Dr. Buffington continued to prescribe Flexeril for spasms. (C. Ex. 1, pg. 31). Admittedly, the claimant had an episode on March 8, 2005, which irritated his back, but the claimant's testimony and the medical records indicate nothing really changed in the way of claimant's back pain or symptoms. I find the credible evidence shows that claimant's back problems were never resolved after his August 19, 2004, compensable injury and this claim really boils down to a determination of additional benefits.

Employers must promptly provide medical services which are reasonably necessary for treatment of compensable injuries. A.C.A. § 11-9-508(a). Injured

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employees have the burden of proving by a preponderance of the evidence that medical treatment is reasonable and necessary for the treatment of the compensable injury. A.C.A. § 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. Air Compressor Equipment v. Sword, 69 Ark. App. 162, 11 S.W.3d 1 (2000).

I conclude that the claimant is entitled to all medical treatment associated with his back that is contained in the record as I find that such treatment was reasonable, necessary and related to the claimant's August 19, 2004, compensable injury. As stated, I find the claimant never reached MMI from his August 19, 2004, compensable injury, and am perplexed as to why Dr. Buffington's recommendation for a specialist and other testing was never carried out. I further find that the additional medical treatment now recommended by Drs. Mocek and Collins are reasonably necessary and related to the claimant's compensable injury of August 19, 2004. After reviewing the claimant's MRI's, Dr. Mocek confirmed the claimant's complaints as legitimate when he opined "these discs abnormalities are not big enough to warrant any type of open surgical procedure. However, they are big enough to cause irritation of the nerve roots and pain." (C. Ex. 1, pp. 88-92).

Claimant requests temporary total disability benefits associated with his

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August 19, 2004, compensable injury. 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. Hwy. & Transp. 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).

I have found that the claimant is still within his healing period for his August 19, 2004, compensable injury. However, I cannot find the claimant is totally incapacitated to earn wages. I reach this conclusion for a number of reasons. First, Dr. Buffington returned the claimant to full duty on November 4, 2004, even though he still recommended further treatment. Also, the record clearly shows the claimant worked a number of different jobs over a two year period even though he was still within his healing period. In fact, one of those jobs the claimant quit on his own accord because he was going to be demoted.

Q Why did you stop working at Tiger Mart doing this job as the Baskin Robbins manager?

A A demotion from a manager position at a higher pay to a lower position at a lower pay, and I did not agree with that.

(T. pg. 15, lines 6-10).

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In making this decision, I note that after November 4, 2004, no doctor took the claimant off work until Dr. Mocek stated the claimant could not operate a taxi due to his medications. (C. Ex. 1, pg. 118). I also recognize that Dr. Mocek opined that it was reasonable and necessary for the claimant to have remained off work since February 22, 2007, (C. Ex. 1, pp. 134-135) however; that goes against my finding that the claimant's condition and symptoms have remained steady since his August 19, 2004, compensable injury. I find the claimant was able to work in some capacity since February 22, 2007, based upon the medical evidence, the claimant's own testimony, and taking into consideration the number of jobs and the type of employment that claimant has had since August 19, 2004. Therefore, I find that claimant has failed to prove by a preponderance of the evidence that he is entitled to temporary total disability benefits and claimant's request for TTD benefits is denied.

AWARD

Respondents are directed to pay benefits in accordance with the findings of fact set forth herein. As this is a medical award only attorney's fees are not applicable.

IT IS SO ORDERED.

S. DALE DOUTHIT
Administrative Law Judge

SDD/pjb