BEFORE THE ARKANSAS WORKERS' COMPENSATION

CLAIM NO. F609203

JAMES E. HOMAN	**CLAIMANT**
LOOMIS FARGO & CO.	**RESPONDENT EMPLOYER**
ACE AMERICAN INSURANCE CO.	**RESPONDENT CARRIER**

ORDER AND OPINION FILED JANUARY 29, 2007

Hearing before Administrative Law JUDGE LINDA K. MARSHALL.

Claimant represented by the HONORABLE M. KEITH WREN, Attorney at Law, Little Rock, Arkansas.

Respondents represented by the HONORABLE FRANK B. NEWELL, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

The above claim came on for a hearing in Little Rock, Arkansas on December 6, 2006. A prehearing conference was held on October 25, 2006, and a prehearing order was filed the same date. A copy of the prehearing order was marked as Commission Exhibit No. 1 and made a part of the record without objection.

At the prehearing conference, the parties agreed to the following stipulations:

1. There was a compensable specific incident June 17, 2005, injury.
2. The compensation rates are $446/335.

The claimant contends that he is entitled to temporary total disability benefits from May 3, 2006, to a date to be determined and attorney's fees.

Respondents contend the claimant is not totally disabled and is not entitled to temporary total disability benefits. Respondents contend a job was offered the claimant

within his restrictions and he declined the job offer.

ISSUES TO BE LITIGATED

1. Temporary total disability benefits.

2. Attorney's fees.

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 Ark. Code Ann. §11-9-704:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. There was a compensable specific incident June 17, 2005, injury.

2. The compensation rates are $446/335.

3. The claimant has proven by a preponderance of the evidence that he remained in his healing period and totally unable to earn wages from May 25, 2006, through a date to be determined.

DISCUSSION

The claimant, 59 years old, worked in building maintenance for the respondent employer for about six and a half years. The building maintenance job required heavy lifting and was quite strenuous requiring a lot of ladder climbing. According to the claimant, he sustained an injury on June 17, 2005, when he fell in some oil and landed on his back and buttocks. The claimant continued working that day but began to have

pain later that evening. The claimant sought medical treatment the next day and had x-rays, muscle relaxers, pain killers and steroids and was placed on light duty. According to the claimant, he continued light duty until January 2006, when management requested he go out on the trucks and he did so. After three days, the claimant's left leg gave out and he had to call in sick. The claimant was given the school run and this required him to go to schools and pick up their deposits for 47 different schools and be finished by 2:00 p.m. This was a considerable amount of walking and moving quickly while driving a Ford Ranger with 200,000 miles on it and a vault/safe behind the passenger's seat.

The claimant returned back to Concentra and was placed on extreme light duty with no lifting and given pain pills, placed in therapy and scheduled for a MRI. The claimant had the MRI and was placed in therapy to strengthen his abdomen section. The claimant continued working light duty in building maintenance until May 2006, when the new general manager eliminated his building maintenance position. The claimant was again offered the school route but, according to the claimant, he was advised by his doctor not to go on the trucks again because of his medications. The claimant takes a total of six prescriptions per day. According to the claimant, Dr. James Bryan wrote the company advising that the claimant could not drive a truck and the claimant testified he has not worked since May 3, 2006. Without the claimant's medication, he has to lay down totally.

Under cross examination, the claimant confirmed that he was refinishing a boat with stripping the finish off of wood trim. The claimant also confirmed that he goes to a flea market about two to three times per month. The claimant testified that he

sometimes stayed for 15 to 20 minutes and sometimes from 45 minutes to an hour. The claimant testified that he took five or six steroid injections in one sitting and is interested in pursuing the procedure recommended by Dr. Christopher Mocek, the pain management specialist.

In order to be entitled to temporary total disability benefits, the claimant must remain in his healing period and be totally unable to earn wages. *Ark. State Hwy. & Transp. Dept. v. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981).

The claimant's authorized treating physician, Dr. James Bryan, orthopedic specialist, opined on May 9, 2006, that the truck driving job offered the claimant was not appropriate for the claimant's condition. On May 25, 2006, Dr. Bryan's report specifically took the claimant off work and referred the claimant to a spine sub-specialist for evaluation. On July 21, 2006, the claimant again saw Dr. Bryan and he opined the claimant was steadily getting worse and unable to work. Dr. Mocek, the pain specialist, administered lumbar facet injections on July 21, 2006; however, the claimant did not get relief. Dr. Mocek next recommended possibly the arthroscopic disc procedure. Dr. Bryan agreed with the plan for arthroscopic associated discectomy or another minimally invasive spine surgery to address the chronic back pain symptoms.

Dr. Barry Baskins, the second opinion physician chosen by respondents, opined on October 30, 2006, that the claimant "is disabled from his work and disabled from going back to any significant heavy work. He has worked in building maintenance and also has done construction type work." (Cl. Exh. No. 1, p. 82.) Dr. Baskins did not agree with the claimant's pain doctors about performing a minimally invasive spine procedure to help with pain as he felt it would not provide a lasting benefit. Dr. Baskins

also stated he felt the claimant could be rated on his three level disc problem as well as the vertebral compression fracture. On November 27, 2006, Dr. Baskins responded to a letter written by respondent's counsel and Dr. Baskins stated that the claimant was at maximum medical improvement on October 30, 2006, and became unequivocal about the claimant's annular tears being work related and finally stated that he did not feel the claimant needed the arthroscopic decompression surgery.

I give considerable more weight to the opinions of the claimant's treating physicians, Dr. Bryan and Dr. Mocek. Both Dr. Bryan and Dr. Mocek have been involved in the evaluation and care and treatment of the claimant as opposed to Dr. Baskins, whose specialty is physical medicine and was hired specifically by the respondents for a one-time look at the claimant and for an evaluation. If Dr. Baskins felt the claimant was at maximum medical improvement on October 30, 2006, that should have been a part of his report and not retroactively stated on November 27, 2006. Dr. Baskins also did not assign a permanent impairment rating either on October 30, 2006 or on November 27, 2006, although he mentioned possible ratings in his October 30, 2006, report. Dr. Baskins does not agree with the minimally invasive procedure that is being proposed by Dr. Mocek and Dr. Bryan; however, I give more weight to the opinions of the treating physicians.

After considering all the credible evidence, to include the claimant's credible testimony and the medical reports in evidence, I find the claimant remained in his healing period and was totally unable to earn wages from May 25, 2006, through a date to be determined. Dr. Bryan's medical reports take the claimant off work and he is still receiving care and treatment and a minimally invasive procedure is still being

considered. The healing period is that period for healing of the injury, which continues until the employee is as far restored as the permanent character of the injury will permit. *Nix v. Wilson World Hotel*, 46 Ark. App. 303, 879 S.W.2d 457 (1994). If the underlying condition causing the disability has become stable and if nothing further in the way of treatment will improve that condition, the healing period has ended. *Id.* Whether an employee's healing period has ended is a factual determination to be made by the Commission. *Ketcher Roofing Co. v. Johnson*, 50 Ark. App. 63, 901 S.W.2d 25 (1995). Dr. Bryan nor Dr. Mocek have stated the claimant is at maximum medical improvement and, further, no impairment ratings have been given.

ORDER

The claimant has proven by a preponderance of the evidence that he remained in his healing period and totally unable to earn wages from May 25, 2006, through a date to be determined.

The claimant's attorney is entitled to the maximum statutory attorney's fee on benefits awarded herein, one-half of which is to be paid by claimant and one-half to be paid by respondents in accordance with Ark. Code Ann. §11-9-715 and Arkansas Workers' Compensation Rules and Regulations, Rule 10.

All sums herein accrued are payable in a lump sum without discount and this award shall bear interest at the maximum legal rate until paid.

IT IS SO ORDERED.

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LINDA K. MARSHALL
ADMINISTRATIVE LAW JUDGE