

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F700407

NORMAN KINZEY, Employee	CLAIMANT
BENTON CO. SUNSHINE SCHOOL, Employer	RESPONDENT
VIRGINIA SURETY COMPANY, Carrier	RESPONDENT

OPINION FILED OCTOBER 4, 2007

Hearing before ADMINISTRATIVE LAW JUDGE GREGORY K. STEWART in Springdale, Washington County, Arkansas.

Claimant represented by ALAN LANE, Attorney, Fayetteville, Arkansas.

Respondents represented by MICHAEL MAYTON, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

On September 12, 2007, the above captioned claim came on for a hearing at Springdale, Arkansas. A pre-hearing conference was conducted on June 6, 2007, and a pre-hearing order was filed on June 7, 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/carrier relationship existed among the parties at all relevant times.
3. The claimant sustained a compensable injury to his neck and back on November 7, 2006.

At the time of the hearing the parties agreed to stipulate that claimant earned an average weekly wage of \$301.00 which would entitle him to compensation at the rate of \$201.00 per week for total disability benefits and \$154.00 per week for permanent partial disability benefits.

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

1. Claimant's entitlement to temporary total disability benefits from November 8, 2006 through a date yet to be determined.

2. Attorney fee.

At the time of the hearing the claimant modified his request for temporary total disability benefits to begin as of December 12, 2006 and continuing through a date yet to be determined. In addition, the parties also agreed to litigate claimant's entitlement to unpaid medical treatment subsequent to the date a change of physician order was entered by the Commission on April 23, 2007.

The claimant contends that he is entitled to additional temporary total disability benefits beginning December 12, 2006 and continuing through a date yet to be determined. Claimant also contends that respondent is liable for payment of medical treatment subsequent to the change of physician order dated April 23, 2007.

The respondents contend that all benefits to which the claimant is entitled have been paid. The claimant is not entitled to any temporary total disability benefits in that the claimant has been released to return to full duty employment by the authorized treating physician. With respect to medical treatment, respondents contend that any additional medical treatment is not reasonable and necessary and causally related to claimant's original compensable 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 witness and to observe his 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 June 6, 2007, and contained in a pre-hearing order filed June 7, 2007, are

hereby accepted as fact.

2. The parties' stipulation that claimant earned an average weekly wage of \$301.00 which would entitle him to compensation at the rate of \$201.00 per week for total disability benefits and \$154.00 per week for permanent partial disability benefits is also hereby accepted as fact.

3. Claimant has met his burden of proving by a preponderance of the evidence that he is entitled to temporary total disability benefits beginning December 12, 2006 and continuing through a date yet to be determined.

4. Claimant has met his burden of proving by a preponderance of the evidence that respondent is liable for additional medical treatment for his compensable injury subsequent to the change of physician order on April 23, 2007. This includes, but is not limited to, all medical treatment by and at the direction of Dr. Knox.

5. Respondent has controverted claimant's entitlement to temporary total disability benefits as of December 12, 2006.

FACTUAL BACKGROUND

The claimant was employed by the respondent as a school bus driver. Claimant suffered a compensable injury to his neck and back on November 11, 2006 when he was involved in a motor vehicle accident while driving the school bus. Following this injury the claimant was sent by the respondent to Dr. Vandergriff who diagnosed claimant's condition as a lumbar strain with spasm. She prescribed medication and exercises and subsequently prescribed physical therapy. When claimant's complaints continued she ordered an MRI scan on November 10, 2006. On November 15, 2006, Dr. Vandergriff indicated that the MRI scan revealed no acute problem and based upon claimant's statements to her indicating that his back was better she released claimant from her care and released him to return to his work duties without restrictions. Claimant subsequently

returned to Dr. Vandergriff on two occasions and she again released claimant on January 11, 2007 with no restrictions.

In addition to Dr. Vandergriff, claimant also sought medical treatment from Dr. Tubb, his primary care physician, on December 11, 2006. At the time of that visit Dr. Tubb referred claimant to Dr. Kyle. Claimant was evaluated by Dr. Kyle on January 9, 2007 who noted that claimant was complaining of back pain even though the MRI scan did not reveal a herniated disc.

Claimant was subsequently referred to Dr. Knox, neurosurgeon, for an evaluation. Claimant was initially evaluated by Dr. Knox on March 14, 2007, at which time he indicated that testing revealed a "rather pronounced anterolisthesis at L5 on S1." Dr. Knox recommended physical therapy and took claimant off work for several months. Subsequent medical reports from Dr. Knox indicate that claimant continued to have significant back pain and most recently Dr. Knox referred claimant to pain management for injections. Medical records indicate that claimant received injections from Dr. Ennis in August 2007. Claimant testified at the hearing that he had a follow-up appointment with Dr. Knox the day after the scheduled hearing.

The respondent accepted claimant's injury as compensable and paid compensation benefits including medical treatment from Dr. Vandergriff. Claimant subsequently sought additional medical treatment on his own from various physicians and filed a change of physician request to Dr. Knox with the Commission which was granted in an order dated April 23, 2007. Claimant has filed this claim contending that he is entitled to temporary total disability benefits beginning December 12, 2006 and continuing through a date yet to be determined. In addition, claimant contends that respondent is liable for all unpaid medical treatment provided subsequent to the change of physician order of April 23.

ADJUDICATION

Claimant has the burden of proving by a preponderance of the evidence that he is entitled to additional medical treatment for his compensable injury. *Dalton v. Allen Engineering Company*, 66 Ark. App. 201, 989 S.W. 2d 543 (1999). In addition, claimant has the burden of proving by a preponderance of the evidence that any requested period of temporary total disability benefits is causally related to his compensable injury.

After reviewing the evidence in this case impartially, without giving the benefit of the doubt to either party, I find that claimant has met his burden of proving by a preponderance of the evidence that he is entitled to additional medical treatment and temporary total disability benefits for his compensable injury.

Following claimant's compensable injury, he was initially evaluated by Dr. Vandergriff who diagnosed claimant's condition as a lumbar strain with spasm. Dr. Vandergriff prescribed medication, exercises, and physical therapy. Dr. Vandergriff eventually ordered an MRI scan which according to her report of November 15, 2006 revealed no acute problems. Based upon the MRI results as well as claimant's indication that his back condition had improved, Dr. Vandergriff released claimant from her care and also released him to return to his work duties without restrictions. Claimant subsequently returned to Dr. Vandergriff on two occasions and she again released claimant from her care with no restrictions as of January 11, 2007.

After his release by Dr. Vandergriff on November 15, 2006, claimant sought medical treatment from his primary care physician, Dr. Tubb. Dr. Tubb took the claimant off work and referred claimant to Dr. Kyle for further evaluation. The day after claimant was taken off work by Dr. Tubb claimant quit working for the respondent. Claimant was evaluated by Dr. Kyle on January 9, 2007 and while he noted that the claimant's MRI scan did not reveal a herniated disc, he also stated that claimant continued to have back pain and that he could not work.

Claimant was evaluated by Dr. Knox on March 14, 2007. As previously noted, Dr. Knox indicated that testing revealed "rather pronounced anterolisthesis at L5 on S1, which is most certainly the culprit of his persistent complaints." More importantly, Dr. Knox went on to indicate that the claimant's work-related injury was the cause of those continued complaints.

I have informed Mr. Kinzey that most definitely, the motor vehicle accident, which occurred this past November, seems to be the culprit of his continued complaints.

As a result of those complaints Dr. Knox has taken claimant off work and has attempted to treat claimant conservatively with physical therapy, medication, and injections.

Although the claimant was originally released by his treating physician, Dr. Vandergriff, as of November 15, 2006, I find that Dr. Knox's opinion regarding claimant's current complaints and their causal relationship to his compensable injury is entitled to great weight. Dr. Knox is a specialist whereas Dr. Vandergriff is a general practitioner. It is the opinion of Dr. Knox that claimant's current complaints are the direct result of the automobile accident which occurred in November.

Given Dr. Knox's opinion, I find that respondent is liable for all reasonable and necessary medical treatment provided to the claimant for his compensable injury subsequent to April 23, 2007. This includes, but is not limited to, all medical treatment provided by and at the direction of Dr. Knox.

I also find that claimant has met his burden of proving by a preponderance of the evidence that he is entitled to temporary total disability benefits beginning December 12, 2006, and continuing through a date yet to be determined. 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, based upon the opinion of Dr. Knox, I find that claimant remains within his healing period for his compensable injury. I also find that claimant has suffered a total incapacity to earn wages as of December 12, 2006, the day after he last worked for the respondent. On December 11, 2006 claimant was taken off work by Dr. Tubb. Since that time claimant has been taken off work by Dr. Kyle and Dr. Knox. Dr. Knox has not yet released claimant to return to regular duties or with restrictions.

Accordingly, for the foregoing reasons, I find that claimant is entitled to temporary total disability benefits beginning December 12, 2006, and continuing through a date yet to be determined.

Because claimant's compensable injury occurred after July 1, 2001, the claimant's attorney fee is governed by the amendments made by the Arkansas General Assembly in 2001. Pursuant to A.C.A. §11-9-715(a)(1)(B), claimant's attorney is entitled to an attorney fee in the amount of 25% of the compensation for indemnity benefits payable to the claimant. Thus, claimant's attorney is entitled to a 25% attorney fee based upon the indemnity benefits awarded. This fee is to be paid one-half by the carrier and one-half by the claimant. Also pursuant to A.C.A. §11-9-715(a)(1)(B), an attorney fee is not awarded on medical benefits.

AWARD

Claimant has met his burden of proving by a preponderance of the evidence that he is entitled to additional medical treatment for his compensable injury. Respondent is liable for payment of all reasonable and necessary medical treatment provided in connection with claimant's compensable injury subsequent to April 23, 2007. This includes, but is not limited to, medical treatment by and at the direction of Dr. Knox. In addition, claimant is entitled to temporary total disability benefits beginning December 12,

2006, and continuing through a date yet to be determined. Respondent has controverted claimant's entitlement to all unpaid indemnity benefits.

Pursuant to A.C.A. §11-9-715(a)(1)(B), claimant's attorney is entitled to an attorney fee in the amount of 25% of the compensation for indemnity benefits payable to the claimant. Thus, claimant's attorney is entitled to a 25% attorney fee based upon the indemnity benefits awarded. This fee is to be paid one-half by the carrier and one-half by the claimant. Also pursuant to A.C.A. §11-9-715(a)(1)(B), an attorney fee is not awarded on medical benefits.

The respondents are ordered to pay the court reporter's charges for preparing the hearing transcript in the amount of \$274.25.

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.

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE