

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F501870

KEVIN MCABEE, Employee	CLAIMANT
SCOTT BURK CONSTRUCTION, Employer	RESPONDENT #1
WESTPORT INSURANCE COMPANY, Carrier	RESPONDENT #1
SECOND INJURY FUND	RESPONDENT #2

OPINION FILED DECEMBER 7, 2007

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

Claimant represented by EVELYN BROOKS, Attorney, Fayetteville, Arkansas.

Respondent #1 represented by WILLIAM C. FRYE, Attorney, Little Rock, Arkansas.

Respondent #2 represented by DAVID PAKE, Attorney, Little Rock, Arkansas, although not participating in hearing.

STATEMENT OF THE CASE

On November 7, 2007, the above captioned claim came on for a hearing at Springdale, Arkansas. A pre-hearing conference was conducted on May 2, 2007, and a pre-hearing order was filed on May 4, 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 prior opinion of the Full Commission filed August 9, 2006 is final.
2. The claimant was earning sufficient wages to entitle him to compensation at the weekly rates of \$466.00 for total disability benefits and \$350.00 for permanent partial disability benefits.

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

1. Claimant's anatomical impairment.
2. Attorney fee.

Subsequent to the pre-hearing conference the claimant modified his request to contend that he has re-entered his healing period and is entitled to additional medical treatment and temporary total disability benefits for his compensable injury. Claimant has reserved as an issue an anatomical impairment rating.

The claimant contends that he has re-entered his healing period for his compensable injury and as a result is entitled to additional medical treatment as well as additional temporary total disability benefits.

The respondent contends that claimant is not entitled to additional medical benefits or temporary total disability benefits for his 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 May 2, 2007, and contained in a pre-hearing order filed May 4, 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 back injury.

FACTUAL BACKGROUND

The claimant is a 43-year-old man who went to work for the respondent in 2002. The respondent is a construction company that remodels Wal-Mart stores. The claimant suffered a compensable injury to his low back while working for respondent on January 22,

2005. On that date the claimant was in the process of putting into a dumpster a counter/cabinet that was in the back of a pickup truck. The driver of the pickup truck backed up and pinned the claimant between the truck's tailgate and the dumpster. Claimant was struck on the right side of his belt line and had intense pain in the right side of his back, right side, and stomach.

Claimant's initial medical treatment for the injury came from the VA Hospital in Jackson, Mississippi. After a short hospitalization period the claimant was released and he returned to Arkansas where he was sent by the respondent to Dr. Tomlinson, orthopaedic surgeon, who ordered an MRI scan which revealed mild facet hypertrophy at the L4-5 and L5-S1 levels. Dr. Tomlinson diagnosed claimant's condition as a lumbosacral strain/sprain with contusion and recommended physical therapy.

In a report dated March 23, 2005, Dr. Tomlinson noted that the claimant had undergone nine physical therapy visits and his condition had not improved. He indicated at that time that he might refer claimant to another therapist; however, before Dr. Tomlinson could provide any additional medical treatment claimant was referred to Dr. Moffitt by the respondent. Dr. Moffitt's initial evaluation occurred on May 2, 2005, and his medical report of that date indicates that x-rays of the claimant's pelvis and hip were negative. Dr. Moffitt diagnosed claimant's condition as a crush injury to the low back and he recommended physical therapy, a bone scan, and an EMG/NCV. The bone scan was read as negative and the EMG/NCV was abnormal, but it was noted that the findings were peripheral in nature rather than central in nature. According to Dr. Raben's deposition testimony, this would indicate a disease process such as diabetes, not nerve damage caused by compression or damage to one particular nerve.

Dr. Moffitt subsequently ordered a functional capacities evaluation which indicated that claimant was capable of performing light physical work. When the physical therapy recommended by Dr. Moffitt was not successful, Dr. Moffitt recommended a steroid

injection. Claimant indicated that he was not interested in a steroid injection and Dr. Moffitt in a report dated July 7, 2005 indicated that he knew of no further treatment that would improve claimant's condition. As a result, he stated that claimant had reached maximum medical improvement and assigned a 5% impairment rating.

Subsequent to claimant's release from Dr. Moffitt, claimant was evaluated by Dr. Raben, neurosurgeon, on December 6, 2005. At the time of that evaluation Dr. Raben made various recommendations including prescriptions, physical therapy, and a steroid injection.

The respondent denied claimant's request for treatment from Dr. Raben. As a result, claimant filed a claim requesting additional medical treatment and temporary total disability benefits as a result of his compensable injury. A hearing was conducted on that claim on January 11, 2006. In an opinion filed February 13, 2006, I found that claimant had failed to meet his burden of proving by a preponderance of the evidence that he was entitled to additional medical treatment or temporary total disability benefits as a result of his compensable injury. This decision was based upon several factors. First, it was noted that the claimant had a history of prior back problems resulting from an injury to his back in 1985 or 1986 while on active duty in the Marine Corps. Claimant testified at the original hearing that the injury led to his discharge from the Marines and he was given a 10% disability as a result of that injury. Furthermore, medical records submitted into evidence from the VA Hospital indicates that claimant has continued to have back pain since that injury. Indeed, shortly before the claimant's compensable injury on January 22, 2005, the claimant was seen at the VA Hospital on September 3, 2004 complaining of back pain so severe that he "can't walk at times."

In support of claimant's contention at the prior hearing he relied primarily upon the recommendations of Dr. Raben. It was noted in the prior opinion that Dr. Raben was not aware that claimant had a history of back problems beginning in 1986 which had continued

up through the date of the work-related injury. In addition, Dr. Raben was not aware that claimant had been taking hydrocodone in part for low back pain prior to his injury nor was he aware that claimant had been on a mild anti-depressant for chronic pain for the last five years. It was also noted that Dr. Raben acknowledged that an MRI scan, bone scan, and an EMG/NCV study did not find any objective findings to explain claimant's current complaints. Finally, it was noted that Dr. Raben testified that he believed claimant suffered an injury to the S-1 joint even though there were no objective findings of injury to the S-1 joint.

The opinion finding that claimant had failed to meet his burden of proving by a preponderance of the evidence that he was entitled to additional medical treatment and/or temporary total disability benefits for his compensable injury was appealed by the claimant and was affirmed and adopted by the Full Commission in an opinion filed August 9, 2006.

Since the time of the last hearing on January 11, 2006, the claimant went to work for Lowe's as a customer service associate in March or April of 2006. Claimant testified that he initially worked part time before moving up to full time work. Claimant initially worked for Lowe's as a department manager over building materials, lumber, and mill work and he was responsible for scheduling, cycle accounts, and inventory control. At some point in time the claimant was transferred from the building materials department to the paint department. Claimant testified that with his back injury he was unable to handle five-gallon buckets of paint and he subsequently terminated his employment with the respondent. Claimant testified that while performing his work for Lowe's he continued to have the same problems of pain in his right hip and numbness down the right leg which he attributes to his original compensable injury. Also since the time of the first hearing the claimant has received medical treatment from the VA Hospital and he has returned to Dr. Raben for medical treatment. Dr. Raben has performed additional testing on the claimant and has recommended surgery.

Claimant has filed this claim contending that he re-entered his healing period and requesting payment of additional medical treatment as well as temporary total disability benefits.

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. *Norma Beatty v. Ben Pearson, Inc.*, Full Commission Opinion filed February 17, 1989 (D612291). 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 meet his burden of proof.

Initially, I believe it is important to note that Dr. Raben in his August 17, 2007 report indicated that: "He [claimant] had questions as to etiology of his pain and we talked about the pain generators and their direct relationship to his on-the-job injury, historically these facts all fit with the objective findings radiologically." Dr. Raben's opinion would indicate support for a finding that claimant's current complaints are the result of his compensable injury. However, as previously pointed out in the opinion of February 13, 2006, there is no indication that Dr. Raben was aware of the claimant's significant back problems which existed prior to January 22, 2005. As previously noted, the claimant had suffered a back injury while in the Marines and he had continued to receive medical treatment for that back condition until shortly before January 22, 2005. As previously noted, on September 3, 2004, the claimant requested additional hydrocodone for back pain which was so severe he was having trouble walking.

Received call from patient. He has been having increased back pain and needing more hydrocodone for comfort. Pain is severe that he can't walk at times.

Medical records from the VA Hospital further indicate that on October 15, 2004 the

claimant was seen for complaints of right groin pain at which time he also complained of pain in the right side of his back.

Furthermore, Dr. Raben had previously acknowledged that an MRI scan, bone scan, and EMG/NCV study did not show any objective findings which would explain claimant's complaints. While further objective testing performed by Dr. Raben has revealed additional findings on which Dr. Raben bases his current opinion, those objective findings did not previously exist. This is particularly important when one considers the history contained in the medical reports for visits subsequent to the hearing on January 11, 2006. After that last hearing, claimant was next evaluated at the VA Hospital on March 28, 2006 with primary complaints of insomnia and depression. The medical records also note that claimant had a back injury a year ago which resulted in damage to his hip, but apparently claimant did not receive any medical treatment at that time for his back. The next medical treatment claimant received for his back occurred when he was evaluated by Dr. Raben on July 11, 2006. Dr. Raben's medical report of that date does not attribute claimant's complaints to the January 22, 2005 compensable injury, but rather indicates that claimant had suffered another injury when he fell on a ladder.

Kevin fell from a height landing on a ladder sustaining multiple transverse process fractures of his lumbar spine. He also had several injuries including rib fractures that have punctured the lung.

Dr. Raben's medical report went on to indicate that this incident occurred on June 24, 2006. Claimant denies informing Dr. Raben that he had fallen landing on a ladder, but instead claims that he only reported the compensable crush injury to him.

This same history is also contained in a report from Dr. Raben's office dated August 15, 2006, which states:

This 42 yr. old male presents today for follow-up of his back pain. He had a fall June 24th and as noted by Dr.

Raben had multiple transverse process fractures of the lumbar spine as well as rib fractures.

The report goes on to note that claimant's primary complaint at that time included pain in the bottom of his feet and that claimant would not allow additional testing due to financial constraints.

Subsequent to that date the claimant was evaluated at the VA Hospital on November 9, 2006. The medical history contained in that report not only refers to the June injury, but also indicates that claimant had suffered another injury to his back when he fell through a ceiling while running wire.

Here for six mth. follow up, denies any pain today.
Reports fell back in June hurting back was tx at St.
Mary's. Was doing ok until fell last night through
ceiling while running wire.

Claimant was diagnosed as suffering from a back strain at that time, with claimant denying any further evaluation or treatment. Claimant did not return to Dr. Raben for any additional medical treatment until July 10, 2007, at which time Dr. Raben recommended the additional testing.

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. Here, the claimant has a history of prior back problems relating to an injury which occurred in 1985 or 1986. Since that time the claimant has continued to receive medical treatment from the VA for that condition with claimant requesting additional hydrocodone for back pain which was so severe that he could hardly walk only four months before his compensable injury. Following claimant's compensable injury he was released by Dr. Moffitt as having reached maximum medical improvement for his compensable injury. Dr. Raben previously made recommendations for additional treatment and a prior hearing was conducted at which time it was determined that claimant had failed to meet his burden of proof. Now, Dr. Raben

has recommended additional medical treatment in the form of surgery. Since the time of the last hearing the claimant has worked for another employer. In addition, Dr. Raben's initial medical report following the last hearing indicates that claimant had fallen and landed on a ladder during which he sustained multiple transverse process fractures of his lumbar spine. While claimant denies giving this history to Dr. Raben, medical records from the VA Hospital dated November 9, 2006 also indicate a history of injury to claimant's back in June 2006 and in addition indicate that claimant had suffered yet another injury when he fell through his ceiling while running wire. While subsequent tests performed at the request of Dr. Raben revealed findings which led Dr. Raben to recommend surgery, those findings were not present on the objective tests which were performed prior to the last hearing. More significantly, these findings were not present until after the incident in June 2006 and the fall from the ceiling in November 2006. Given all of this evidence, I simply find that claimant has failed to meet his burden of proving by a preponderance of the evidence that he is entitled to additional medical treatment for his compensable injury of January 22, 2005.

Based upon the same evidence, I also find that claimant has failed to prove by a preponderance of the evidence that he is entitled to additional temporary total disability benefits as a result of his January 22, 2005 compensable injury.

ORDER

Claimant has failed to prove by a preponderance of the evidence that he is entitled to additional medical treatment and/or temporary total disability benefits as a result of his compensable injury. Therefore, his claim for 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 \$368.25.

IT IS SO ORDERED.

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE