BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F609808

ERISTIS POINDEXTER, Employee	CLAIMANT
ABC PAINTING, INC., Employer	RESPONDENT #1
COMPANION PROPERTY & CASUALTY, Carrier	RESPONDENT #1
SECOND INJURY FUND	RESPONDENT #2

OPINION FILED NOVEMBER 28, 2007

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

Claimant represented by STEPHEN SHARUM, Attorney, Fort Smith, Arkansas.

Respondent #1 represented by ANDY CALDWELL, Attorney, Little Rock, Arkansas.

Respondent #2 represented by JUDY RUDD, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

On October 28, 2007, the above captioned claim came on for a hearing at Springdale, Arkansas. A pre-hearing conference was conducted on May 30, 2007, and a pre-hearing order was filed on that same date. 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.

At the time of the hearing the parties agreed to stipulate that claimant suffered a compensable injury as a result of a fall while working for respondent on July 8, 2006.

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

1. Compensability of injuries to claimant's cervical and lumbar spine on July 8, 2006.

2. Compensation rate.

3. Temporary total disability benefits from July 9, 2006 through a date yet to be determined.

4. Attorney fee.

Based upon the parties' stipulation that claimant suffered a compensable injury on July 8, 2006, compensability is no longer an issue. Claimant's request for additional medical treatment was inadvertently left out of the pre-hearing order; therefore, it was added as an issue at the time of the hearing.

The claimant contends that on July 8, 2006 he was working at a job site during and within the scope of his employment. Claimant contends he is entitled to temporary total disability benefits from July 9, 2006 to a date yet to be determined. The claimant has not been permitted to continue his treatment with Dr. Tony Raben, orthopaedic surgeon, for follow-up treatment. The claimant's treating physician has requested an MRI of the cervical spine and an MRI of the lumbar spine, which has been denied by the respondents. The Commission has authorized Dr. Tony Raben as the claimant's authorized treating physician by change of physician order dated January 19, 2007. The claimant met with his treating physician as scheduled by Commission order on March 12, 2007 and all treatment subsequent to that date has been denied by the respondents. Respondents controverted the claim by AR-2 dated April 10, 2007. This claim has been controverted in its entirety.

The respondents contend they initially accepted this claim as a medical only claim and paid all appropriate benefits. The claimant was initially seen by Dr. Schemel and obtained a change of physician order to Dr. Tony Raben on January 19, 2007. The respondents controverted the claim subsequent to the claimant's initial visit with Dr. Raben. Dr. Raben requested authorization to treat the claimant and for an MRI of the claimant's

cervical and lumbar spine. The respondents contend that the claimant was non-compliant with his medical care and that the requested medical treatment by Dr. Raben is not reasonable, necessary, or causally related to the claimant's employment.

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 May 30, 2007, and contained in a pre-hearing order filed that same date, are hereby accepted as fact.

2. The parties' stipulation that claimant suffered a compensable injury as the result of a fall while working for respondent on July 8, 2006 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 additional medical treatment for his compensable injury.

4. As a result of his compensable injury the claimant is entitled to temporary total disability benefits beginning July 9, 2006 and continuing through September 1, 2006.

5. Respondent has controverted claimant's entitlement to unpaid temporary total disability benefits.

FACTUAL BACKGROUND

The claimant is a 41-year-old man who began working for the respondent in February 2006 as a painter. After one week on the job the claimant also became a supervisor. On July 8, 2006, the claimant was on a scaffold some 15 to 20 feet high and as he reached over to paint some crown molding, lost his balance and fell off the scaffold.

As claimant fell he struck other crown molding over a bookcase with his neck before landing on his buttocks on a concrete floor. Claimant testified that he felt immediate pain "running up and down my legs and back". Claimant was taken by ambulance to Washington Regional Medical Center with complaints of neck and back pain.

Medical records from Washington Regional Medical Center dated July 8, 2006 indicate that multiple x-rays were taken which revealed no fractures. Claimant was diagnosed as having suffered a fall injury with cervical strain, contusion of coccyx, and minor contusions. Claimant was given medication and instructed to engage in "progressive activities as tolerated."

Claimant did not return to work for the respondent or for any other employer after the fall on July 8, 2006. On August 7, 2006, the claimant was evaluated by Dr. Schemel whose appointment was arranged by the respondent. Dr. Schemel diagnosed claimant's condition as an impact injury to the spine with coccydynia, lumbago, cervicalgia, and right trapezius pain. Dr. Schemel ordered a bone scan and prescribed medications for the claimant.

In a report dated August 25, 2006, Dr. Schemel indicated that claimant's bone scan was normal. As a result, he recommended physical therapy and continued claimant's medication. A subsequent report from Dr. Schemel dated September 22, 2006 indicates that claimant has not responded to physical therapy and still complains of pain in his neck and back. Dr. Schemel released the claimant to return to work and also stated that he would refer claimant to Dr. Brooks for a rehabilitation evaluation. A subsequent report from Dr. Schemel dated October 13, 2006 indicates that claimant's complaints continued and he again indicated that claimant should be evaluated by Dr. Brooks.

Apparently, claimant did not undergo the evaluation by Dr. Brooks as requested by Dr. Schemel. Claimant did file for a change of physician request which was granted to Dr. Raben by the Commission on January 19, 2007. Claimant was evaluated by Dr. Raben

on March 12, 2007 and diagnosed with cervical spine pain, lumbar spine degeneration, and disc herniation. Dr. Raben prescribed claimant medication and ordered an MRI scan. Claimant has not undergone the MRI scan due to the denial of the claim by the respondent.

Claimant has filed this claim contending that he is entitled to additional medical treatment for his compensable injury. He also seeks payment of temporary total disability benefits beginning July 9, 2006 and continuing through a date yet to be determined, as well as a controverted attorney fee.

ADJUDICATION

______The initial issue for consideration involves claimant's request for additional medical treatment for his compensable injury. Claimant has the burden of proving by a preponderance of the evidence that he is entitled to additional medical treatment. *Dalton v. Allen Engineering Company*, 66 Ark. App. 201, 989 S.W. 2d 543 (1999). 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.

First, it should be noted that claimant previously suffered a work-related injury to his low back while working for an employer in Oklahoma in 1991. Claimant was treated with physical therapy and medication. Claimant was also taken off work for a period of time. It appears from a review of the medical records that claimant was last seen for this prior back injury on January 24, 1992 when he was assigned a 21% impairment rating. The documentary evidence contains no medical records indicating that claimant sought any additional medical treatment for his back until the fall on July 8, 2006, some 14 years later.

Claimant's initial medical treatment following his injury on July 8 occurred at the emergency room at Washington Regional Medical Center. Claimant was diagnosed as

suffering from a strain and contusions. He was given medications and instructed to engage in progressive activities as tolerated. Claimant was also instructed to receive follow up treatment if his condition did not improve. Claimant's condition did not improve and he was referred by the respondent to Dr. Schemel for additional treatment. Dr. Schemel treated claimant conservatively with medication and physical therapy. At the time of the visit on September 22, 2006, Dr. Schemel referred claimant to Dr. Brooks for a rehabilitation evaluation. Subsequently, Dr. Schemel in a report dated October 13, 2006 again indicated that claimant should be evaluated by Dr. Brooks. Dr. Schemel's medical reports are significant in that they reflect his opinion that claimant needed further evaluation. Claimant subsequently filed a request to change physicians and was granted a change to Dr. Raben by the Commission on January 19, 2007. Dr. Raben has diagnosed claimant as suffering from cervical spine pain, spine degeneration, and a disc herniation. Dr. Raben's medical records reflect a history of claimant's complaints beginning as a result of the fall on July 8, 2006. Based upon those complaints Dr. Raben has ordered an MRI scan.

I find based upon the evidence presented that 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. While claimant had a prior work-related injury to his back in 1991, there is no indication that claimant has sought any additional medical treatment for his low back after January 1992 until the fall on July 8, 2006. The emergency room record indicates that claimant should follow up with a treating physician if his condition did not improve. When claimant's condition did not improve he was referred by respondent to Dr. Schemel. Dr. Schemel did not release the claimant as having reached maximum medical improvement, but instead referred him to Dr. Brooks for a rehabilitation evaluation. Claimant did not see Dr. Brooks, but instead was evaluated by Dr. Raben who has recommended an MRI scan. I find based upon this evidence that

claimant's need for additional medical treatment is causally related to his compensable injury; therefore, claimant is entitled to additional medical treatment.

The next issue for consideration involves claimant's request for temporary total disability benefits. The claimant's injury is an unscheduled injury. In order to be entitled to temporary total disability benefits for an unscheduled injury 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 foregoing medical evidence previously discussed indicating that claimant is in need of additional medical treatment. I find that claimant has remained within his healing period for his compensable injury. However, I do not find that claimant has continued to suffer a total incapacity to earn wages.

At the time of claimant's initial medical treatment at the emergency room on July 8, 2006, he was instructed to engage in progressive activities as tolerated. Claimant testified that he was taking significant pain medication during this time and he did not believe that he was capable of working. In other words, claimant could not tolerate his job activities. Claimant subsequently came under the care of Dr. Schemel who did not specifically state that claimant was incapable of working. However, in his report of August 25, 2006, Dr. Schemel indicated that he had a discussion with the claimant regarding a potential return to work with restrictions. This would indicate that as of that date Dr. Schemel was of the opinion that claimant was totally incapacitated from working. On September 22, 2006, Dr. Schemel released the claimant to work eight hours per day on light duty with no bending, twisting, stooping, or carrying more than 20 pounds. In a letter dated that same date, Dr. Schemel also noted that claimant previously had a follow-up appointment for September 1 which he did not keep. Dr. Schemel indicated that as of September 1 he would have anticipated that claimant could have performed light duty work for four hours per day and

regular duties for four hours per day.

In short, Dr. Schemel was of the opinion that as of September 1 the claimant was capable of working eight hours per day. Between September 1 and September 22 this would have been four hours of light duty and four hours of regular duty, and subsequent to September 22 would have consisted of eight hours of light duty work.

Claimant was evaluated by Dr. Raben on March 12, 2007 who noted that claimant was not working at that time. Dr. Raben did not specifically address the claimant's ability to earn wages.

In summary, 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. I find that claimant has remained within his healing period since the time of his injury on July 8, 2006. However, I find that claimant only suffered a total incapacity to earn wages from July 9, 2006 through September 1, 2006. According to Dr. Schemel's letter of September 22, 2006, he would have released claimant as of September 1 to return to work for eight hours per day, with four hours of light duty work and four hours of regular duty work. Even as of September 22, 2006, Dr. Schemel was of the opinion that claimant could perform light duty work for eight hours per day. Given this evidence, claimant did not suffer a total incapacity to earn wages subsequent to September 1, 2006.

It should be noted with respect to claimant's ability to return to work and his need for additional medical treatment that respondent called as a witness Jason Hickman, a private investigator. Claimant objected to the testimony of Hickman and this objection was sustained. Respondent then proffered the testimony of Hickman into evidence. The testimony of Hickman has not been considered in reaching a decision in this case. Furthermore, I believe an additional clarification with respect to my decision is necessary. The pre-hearing order filed on May 30, 2007 indicates that witnesses will not be allowed

to testify unless the name of a witness is furnished to an opposing party at least seven days prior to the hearing. In this case, respondent did provide the name of Hickman to the claimant seven days prior to the hearing. However, the pre-hearing order also indicates that the order shall not be construed to limit or change a party's obligation with regard to discovery initiated by a party pursuant to the Arkansas Rules of Civil Procedure. In this case, claimant sent interrogatories to respondent. Interrogatory Number 2 requested that the respondent state the name of every witness and give a brief synopsis of the testimony of each witness. Hickman was not named in those interrogatories and the respondent agreed to supplement its response pursuant to the Arkansas Rules of Civil Procedure. While respondent did provide the name of Hickman to the claimant seven days prior to the hearing, respondent did not supplement its answers to interrogatories to provide a synopsis of Hickman's testimony. Claimant was entitled to rely upon respondent's answers to interrogatories and its agreement to supplement those answers in the future. Because the synopsis of Hickman's testimony was not provided as agreed to by respondent, the claimant's objection to Hickman's testimony was sustained.

Finally, it should be noted that an issue for consideration involves the claimant's compensation rate. The claimant and the respondent agreed to stipulate to compensation rates of $400.00 for total disability benefits and $300.00 for permanent partial disability benefits. Because wage records were not available, the Second Injury Fund was not able to stipulate to this compensation rate. There is insufficient evidence of record to determine a compensation rate and suffice it to say that given the parties prior agreement, a stipulated compensation rate should be capable of being determined by the parties.

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 of July 8, 2006. Claimant is also entitled to temporary total disability benefits beginning July 9, 2006 and continuing through September 1, 2006. Respondent has controverted claimant's entitlement to unpaid temporary total disability 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 $625.50.

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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GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE