

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F600809

RONALD R. REESE, EMPLOYEE **CLAIMANT**

**COOPER TIRE & RUBBER COMPANY,
SELF-INSURED EMPLOYER** **RESPONDENT**

**CROCKETT ADJUSTMENT, INC.,
INSURANCE CARRIER/TPA** **RESPONDENT**

OPINION FILED AUGUST 31, 2007

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

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

The respondents were represented by Mr. William G. Bullock, Attorney at Law, Texarkana, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above-styled claim on June 5, 2007, in Texarkana, Arkansas. A prehearing conference was conducted in this case on April 12, 2007, and a Prehearing Order was filed April 13, 2007. The parties agreed that the Prehearing Order would be made a part of the record as "Commission Exhibit 1," subject to any modifications made to it on the record 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 December 16, 2005.

Ronald Reese - F600809

- 3) The claimant's applicable compensation rates are \$466.00 per week for temporary total disability and \$350.00 per week for permanent partial disability.
- 4) Claimant sustained a compensable right lower extremity injury on December 16, 2005. (T. pg. 15, lines 7-11).
- 5) Should benefits be awarded respondents would be entitled to a credit pursuant to A.C.A. § 11-9-411 for benefits received by claimant through the employer's accident and sickness plan.

The parties agreed to litigate the following issues at the full hearing:

- 1) Whether the claimant sustained a compensable back injury on December 16, 2005.
- 2) If compensability is overcome, whether claimant would be entitled to all associated medical treatment, attorney's fees, permanent partial disability benefits, and temporary total disability benefits from June 10, 2006, through June 22, 2006, and September 30, 2006, through October 31, 2006.

The claimant contended at the full hearing, in summary, that he sustained a compensable back injury on December 16, 2005. As a result of his compensable back injury, claimant contends he is entitled to all associated medical treatment from the date of injury through November 11, 2006, permanent partial disability benefits equal to a 12% whole body impairment rating, attorney's fees, and temporary total disability benefits from June 10, 2006, through June 22, 2006, and September 30, 2006, through October 31, 2006. Claimant reserves all issues not specifically addressed in the issues outlined herein.

Ronald Reese - F600809

Respondents contended at the full hearing, in summary, that claimant did sustain a compensable right leg injury on December 16, 2005; however, respondents contend claimant did not sustain a compensable back injury on December 16, 2005. Respondents contended that any permanent impairment rating being claimed by the claimant is not related to anything that happened on December 16, 2005. Respondents contended that the claimant cannot meet the statutory burden of proving that he has, as a proximate result of the December 16, 2005, accident, need for medical treatment, temporary total disability and permanent partial disability beyond the degree and for the period respondents have already accepted or paid.

Respondents contended at the full hearing that the “major cause” of any additional medical treatment, temporary total disability or permanent partial disability that claimant has experienced in excess of what respondents have already accepted was not the incident of December 16, 2005, but instead one or more intervening and superseding causes and/or the natural progression of claimant’s preexisting condition. Respondents contend claimant has failed to comply with the reasonable recommendations for treatment by his treating physician.

DISCUSSION

A) HISTORY

The claimant alleges he suffered a compensable injury to his back on

Ronald Reese - F600809

December 16, 2005, while working for the respondent. The claimant testified that he had worked for the respondent since October of 1989 doing various duties, but for the six years preceding his alleged injury the claimant testified he was a 1-DR tire builder.

The claimant testified as follows regarding his duties as a 1-DR tire builder:

A I would call it extreme physical labor, extensive walking throughout the day, a lot of lifting, twisting. I lift up to 50 pound tires. I pull in 2,000 pound racks of tread, and it's continuous 12 hour, very few breaks.

Q When we say you're a tire builder, what does that mean? What are you actually doing?

A I'm assembling steel belts and rubber and a, what's called a carcass that someone else builds, and I'm lifting these materials, putting them together and then lifting the whole assembly and putting it on a conveyor. (T. pg. 21, lines 8-19).

The claimant testified that prior to December 16, 2005, his back was "100 percent", and that he was having no problems with his right leg. (T. pg. 23, lines 5-13). Claimant testified as follows regarding the specific incident on December 16, 2005, he alleges caused his compensable back injury:

A Okay. I went to pull in a rack of tread, which they tell me they weigh about 2,000 pounds. It's several layers of tread, and you pull it in as part of the assembly process. I pull in anywhere from six to ten of those a day.

Q Did this rack have wheels on it?

A Yes, sir. It had wheels. One of the wheels was defective, and I'm in the regular process of . . . sometimes they do have defective wheels, and I'll

Ronald Reese - F600809

put a tag on it so that they'll fix it, but this day, you know, I'm working as hard as I can. I was at a rate of that day of building ninety tires an hour, and an average tire builder is going to build about forty-five tires an hour, so I'm going at almost double the rate of most of the people around me, so I'm trying to get this . . . The guys around me are also hard workers, also, and if we have a problem with a tread tray or just anything, we'll help each other out, and I struggled with this one for about a minute or so before the guy next to me noticed. I was yanking, pulling, tugging, trying to do whatever I could do to get this tread tray in there, and it wasn't budging, and at that time, I felt a sharp pain in my leg, and this other guy came over and helped me. It still took us about another minute and a half after that to get that thing, to get it pulled up in there to where it needed to be so that I could work.

Q Now, when you say you felt a sharp pain in your leg, which leg are you referring to?

A My right leg and buttock area. At that time, I assumed that I had pulled a hamstring. That's what it felt like. I've never had a pulled hamstring, but that's just what it felt like to me. (T. pg. 24, lines 6-25, pg. 25, lines 1-13).

The claimant testified that after he felt the sharp pain in his leg he continued to work, but started sweating profusely. At that point, the claimant reported his problems to a supervisor. The claimant testified his employer sent him to the hospital the day of the incident. The medical records indicate the claimant saw Dr. David Williams on December 16, 2005, and was treated for right upper leg pain. The claimant continued to treat with Dr. Williams on December 27, 2005, January 3, 2006, and January 10, 2006, due to increasing pain in his right leg.

The claimant treated with Dr. Richard Sharp from January 17, 2006, through

Ronald Reese - F600809

February 22, 2006, due to right buttock pain. With claimant's continued symptoms, Dr. Sharp referred the claimant to Dr. Michael Pappas. Ultimately, Dr. Pappas recommended an MRI of the claimant's lumbar spine. The MRI showed a moderate to large area of extension of the L5-S1 disc into the canal interior to the right which compressed the nerve root. (Claimant's Exhibit 1, pg. 29). Dr. Pappas in his May 1, 2006, report stated "his disc on L5 could be contributing to his pain". (Claimant's Exhibit 1, pg. 30).

The claimant saw Dr. Eric Akin on May 3, 2006, and Dr. Akin reviewed the claimant's EMG study. Dr. Akin found the claimant's EMG study to be normal, but did note a disc prolapse at L5-S1 pursuant to the claimant's recent MRI of the lumbar spine. Dr. Akin also mentioned that claimant's functional capacity evaluation which showed reliable effort and found the claimant could do medium level work with a forty pound lift/pull restriction. Subject to the restrictions, Dr. Akin found the claimant at maximum medical improvement. On May 25, 2006, Dr. Akin returned the claimant to work with restrictions. (Claimant's Exhibit 1, pg. 49). Then a few days later on June 2, 2006, Dr. Akin took the claimant back off work until his next appointment. (Claimant's Exhibit 1, pg. 50).

The medical records reflect the claimant had an MRI of the lumbar spine on March 26, 1996, which showed "degenerative disc disease at L4-L5 and L5-S1 with

Ronald Reese - F600809

mild central disc bulging at L5-S1". (Respondents' Exhibit 2, pg. 1). Dr. Pappas reviewed both MRI reports and stated "his herniation at L4-5 is worse." (Claimant's Exhibit 1, pg. 51). Dr. Akin discussed the claimant's April 2006 lumbar MRI, and stated "there is a right-sided disc protrusion at L5-S1, which abuts the S1 nerve root on the right. This is the only item which could potentially explain his symptoms in terms of the spine." (Claimant's Exhibit 1, pg. 52-53). Dr. Akin then returned the claimant back to work on restricted duty effective June 22, 2006. (Claimant's Exhibit 1, pg. 55). The claimant went to be evaluated by Dr. Stanley Jones on July 8, 2006, and went to the Gabbie Medical Clinic on July 25, 2006, and August 8, 2006, where a myelogram was recommended. Dr. Akin's 8-18-06 myelogram report stated the following:

Findings- There is normal anatomic alignment of the lumbar vertebrae. The tip of the conus medullaris terminates at the superior aspect of the L1. There are five lumbar-type vertebral bodies demonstrated.

There is no evidence of spinal canal or neural foraminal stenosis from T12-L1 though L3-L4.

L4-5- There is a small posterior disc bulge with mild thickening of the ligamentum flavum. There is mild narrowing of the bilateral neural foramina. No significant spinal canal stenosis is seen.

L5-S1- There is a broad-based posterior disc bulge with thickening of ligamentum flavum. There is mild increase in epidural fat of the posterior epidural space. This is associated with a triangulated appearance of the thecal sac at this level. Additionally, the traversing right S1 nerve appears to abut the disc bulge.

Ronald Reese - F600809

There is no evidence of an osseous lesion, osseous fracture, or other a(inelligible)te process.

Impression-

At the L5-S1 level there is a small posterior disc bulge and a thickened ligamentum flavum. There is mild increasing fat within the anterior and posterior epidural spaces, creating a triangulated appearance of the thecal sac. The traversing S1 nerve root appears to abut the posterior disc on the right.

Dr. Akin's August 22, 2006, myelogram report stated that he found "no explanation for the claimant's symptoms" (Claimant's Exhibit 1, pg. 77), and returned the claimant to work per the Functional Capacity Evaluation restrictions. On August 23, 2006, respondents filed Form AR-2 with the Commission stating they were controverting the claim due to no objective findings to substantiate payment of further benefits. (Claimant's Exhibit 1, pg. 79).

The claimant then returned to Dr. Stanley Jones, and on October 3, 2006, the claimant underwent surgery on his lumbar spine. (Claimant's Exhibit 1, pg. 81-82). Lumbar hemilaminotomies were performed bilaterally at L5-S1, lumbar hemilaminotomy on the right side at L4-L5, lateral recess decompression was done with lateral flavectomies bilaterally at L5-S1, and also on the right at L4-L5. (Claimant's Exhibit 1, pg. 82). Dr. Jones found during surgery the following objective findings:

The patient had a very abnormal disc at L5-S1 on the right with huge

Ronald Reese - F600809

sequestered and extruded fragment. Disc fragments were removed on the right and the right S1 nerve was very red and was very swollen. The nerve was caught between bone and disc, and was also compressed because of associated thickening of the ligamentum flavum. This was much worse than could be appreciated with imaging studies. Lateral recess at LL5-S1 was markedly compressed on the right and was to a lesser degree on the left. Therefore, bilateral S1 nerve foraminotomies were done with lateral recess decompressions were performed. Multiple large disc fragments were removed at L5-S1. All fragments that could be safely removed were removed and the disc was left intact as much as possible.

Following the surgery from Dr. Jones, claimant testified that his back continued to improve. However, on November 12, 2006, the claimant tripped and fell in an E-Z Mart and reinjured his back. Dr. Jones opined that the claimant would have reached maximum medical improvement from the October 2006 surgery on November 1, 2006, if it were not for the E-Z Mart incident. Due to the November 12, 2006, incident, claimant only requested to litigate his entitlement to benefits up to November 11, 2006, at the present time.

B) ADJUDICATION

It must first be pointed out that I found the claimant to be a credible witness. Still, to prove the occurrence of a compensable injury as a result of a specific incident which is identifiable by time and place of occurrence the claimant must establish by a preponderance of the evidence:

- 1) that an injury occurred arising out of and in the scope of employment;

Ronald Reese - F600809

- 2) that the injury caused internal and external harm to the body which required medical services, or resulted in disability or death;
- 3) that the injury is established by medical evidence supported by objective findings, as defined in A.C.A. § 11-9-102(16); and,
- 4) that the injury was caused by a specific incident and is identifiable by time and place of occurrence.

Mickel v. Engineered Specialty Plastics, 56 Ark. App. 126, 938 S.W.2d 876 (1997).

Respondents have controverted claimant's back injury for a number of reasons. One argument from the respondents is that claimant only complained of leg pain after his December 16, 2005, incident and not back pain. As a result the claimant was wrongly treated for his condition. The medical reports and diagnostic studies clearly show the claimant had a lumbar injury. Just because a claimant's back injury manifested itself in the form of radiating leg pain, does not eliminate the objective medical evidence of a back injury. The Commission does not base a compensable injury on complaints of pain and likewise this administrative law judge will not overlook objective findings due to lack of complaints of pain.

Respondents also introduced an MRI of the claimant's lumbar spine done in 1996 which showed degenerative disc disease and a mild central disc bulge at L5-S1. (Respondents' Exhibit 2, pg. 1). Respondents argue that preexisting conditions were responsible for the claimant's back problems; however, the claimant's lumbar MRI

Ronald Reese - F600809

done after the December 16, 2005, incident clearly shows objective findings of the nerve root being compressed at L5-S1. Further, even Dr. Pappas stated that he viewed both MRI's and stated "his herniation at L4-L5 is worse". (Claimant's Exhibit 1, pg. 51). It must be noted that the claimant worked with no back or leg complaints for over nine years after the 1996 MRI. Not until the incident on December 16, 2005, did the claimant have any need for medical treatment regarding his back. The nerve compression was not evident by MRI until after the December 16, 2005, incident. Clearly, the claimant's back injury arose out of his employment on December 16, 2005, and the need for medical treatment for the claimant's back was due to the claimant's December 16, 2005, back injury.

Based on the medical records in evidence and the claimant's credible testimony, I find the claimant has proven by a preponderance of the evidence that he sustained a compensable back injury while performing employment services for the respondents on December 16, 2005. In making this finding, I do not dismiss the claimant's previous diagnosis of degenerative disc disease. However, the evidence is clear that the claimant's back condition dramatically and objectively changed after he attempted to move a cart weighing approximately 2,000 pounds on December 16, 2005. No one attempted to refute the claimant's credible testimony that a wheel on the cart was defective or that he was jerking and pulling the cart on the date in

Ronald Reese - F600809

question in an attempt to get it free to roll. The medical records clearly show the claimant's back condition became significantly worse (see Dr. Pappas' report of June 12, 2006, at Claimant's Exhibit 1, pg. 51) both objectively and subjectively. Clearly the MRI of April 24, 2006, shows that the L5-S1 disc compressed the nerve root. Such compression was not shown on the 1996 MRI. Then, if there were any doubt as to the objective findings of the claimant's injury, that Dr. Jones' operative report clearly shows that the S1 nerve was very red and very swollen and that the nerve was actually caught between bone and disc and was compressed which shows that the claimant's condition was dramatically different than that in 1996. I find that the claimant has met all the elements outline herein of compensability regarding his back injury that occurred by specific incident on December 16, 2005.

Since the claimant has proven a compensable injury by a preponderance of the evidence, respondents are responsible for all associated medical treatment. An employer shall promptly provide for an injured employee such medical treatment as may be reasonably necessary in connection with the injury received by the employee. A.C.A. § 11-9-508(a). Here, the respondents argue that they should not be responsible for medical treatment related to the claimant's back, and especially not responsible for anything incurred after Dr. Akin found the claimant at maximum medical improvement. I disagree.

Ronald Reese - F600809

I find that Dr. Jones' treatment and operation in October of 2006 was reasonably necessary and related to the claimant's compensable back injury for a number of reasons. Most importantly, I disagree with Dr. Akin's assessment that he did not have an explanation for claimant's symptoms. (Claimant's Exhibit 1, pg. 77-78). The April 24, 2006, MRI said that the extrusion of the L5-S1 disc compressed the nerve root. (Claimant's Exhibit 1, pg. 29). Even Dr. Pappas stated "his disc on L5 could be contributing to his pain". (Claimant's Exhibit 1, pg. 30). Finally, when Dr. Jones opened the claimant up he could objectively see that the right S1 nerve was very red and swollen. Dr. Jones specifically stated that the nerve was caught between bone and disc, and was much worse than could be appreciated with imaging studies. (Claimant's Exhibit 1, pg. 81-83). I find that all treatment for the claimant's back contained in the record herein up to November 11, 2006, to be reasonable, necessary and related to the claimant's compensable back injury and therefore the respondents' responsibility.

Claimant contends he is entitled to temporary total disability benefits for the periods of June 10, 2006, through June 22, 2006, and September 30, 2006, through October 31, 2006. The claimant is entitled to temporary total disability benefits if he can satisfy a two-prong test:

- 1) claimant must be within his healing period; and,

Ronald Reese - F600809

2) incapacitated from earning wages.

Ark. Hwy. & Transp. Dept. v. Breshears, 272 Ark. 244, 613 S.W.2d 392 (1981).

The healing period is defined as that period for healing the injury, which continues until claimant is as far restored as the permanent nature of the injury will allow. **Nix v. Wilson World Hotel**, 46 Ark. App. 303, 879 S.W.2d 459 (1994).

It is true that immediately up to the first period of temporary total disability requested by the claimant (6-10-06 - 6-22-06) the claimant's physicians indicated he could return to work under the restrictions of his Functional Capacity Evaluation up through June 1, 2006; however, on June 2, 2006, Dr. Akin took the claimant completely off work until their next appointment. (Claimant's Exhibit 1, pg. 50). Claimant's next scheduled appointment was to be on June 8, 2006; however, the claimant credibly testified that he was unable to make that appointment because he was so ill with pain from his leg that he threw up. The next time Dr. Akin returned the claimant to work by written report was June 22, 2006, with restrictions. (Claimant's Exhibit 1, pg. 55). Now, with the benefit of perfect hindsight, it is clear the claimant was still within his healing period as I find the claimant's healing period did not end until November 1, 2006, per Dr. Jones' April 30, 2007, report. (Claimant's Exhibit 1, pg. 112). In addition, claimant was unable to earn meaningful wages during the period of June 10, 2006, through June 22, 2006, due to Dr. Akin's

Ronald Reese - F600809

June 2, 2006, “off work” report, and based upon the claimant’s credible testimony. Respondents argue that since the claimant missed his June 8, 2006, appointment with Dr. Akin that he should be precluded from receiving temporary total disability. I disagree. The claimant was clearly taken off work during the period requested, and after Dr. Jones’ operative report evidencing claimant’s swollen S1 nerve due to the disc pushing into the bone, the claimant should never have been returned to work at all until a decompression was performed. The claimant is clearly entitled to temporary total disability benefits for the period requested.

The next period of temporary total disability requested from the claimant is September 30, 2006, through October 31, 2006, I find that based upon the medical evidence and the claimant’s testimony that he was still within his healing period and unable to earn meaningful wages for this period requested. Therefore, I find claimant is entitled to temporary total disability benefits for the period of September 30, 2006, through October 31, 2006.

The claimant has requested permanent partial disability benefits equal to a twelve percent whole body impairment rating. The burden rests upon the claimant to prove the existence and extent of permanent physical impairment. He must show that any permanent physical impairment is supported by objective and measurable physical or mental findings. A.C.A. § 11-9-704(c)(i)(B). The claimant must show that the

Ronald Reese - F600809

compensable injury or injuries was the major cause of the specific degree or percentage of permanent physical impairment. A.C.A. § 11-9-102(4)(F)(ii)(a). The term “major cause” is defined as more than fifty percent of the cause. A.C.A. § 11-9-102(14)(A).

Although expert medical opinion may be relevant to the existence and extent of permanent physical impairment, it is the obligation of this Commission, rather than any medical expert, to ascertain the existence and exact extent of permanent physical impairment in a manner that conforms with the requirements of the Act.

I find that the evidence shows the claimant’s compensable back injury is the major cause of his permanent physical impairment. Clearly, the claimant had no back pain or complaints for six years prior to December 16, 2005, while performing the same tasks for the respondents. Even though the claimant had some degenerative problems per his 1996 MRI, he had no nerve compression as was evidence by his April 2006 MRI and operative report. It was the nerve compression caused by his December 16, 2005, compensable incident that was the major cause for the claimant’s back surgery.

The surgery consisted of a decompression at the L5-S1 level and also various procedures at the L4-L5 level. Respondents argue that the L4-L5 level should not be considered in assessing the claimant’s impairment rating because it was looked at by

Ronald Reese - F600809

Dr. Jones only due to the claimant's preexisting degenerative condition. I deem that an additional one percent should be added to the claimant's impairment rating at L4-L5 because also there was a diagnosis of disc prolapse at L4-L5 which I find was an objective finding of injury at that level.

I do disagree with Dr. Jones' impairment rating of twelve percent. I find that pursuant to the AMA Guides to the Evaluation of Permanent Impairment, 4th Edition, Table 75, Section IV A, that the claimant had a single level decompression without spinal fusion and without residual signs or symptoms which would entitle the claimant to an eight percent whole body impairment rating plus an additional one percent pursuant to **Section IV E** for the L4-L5 level that was operated on for a total permanent physical impairment rating of nine percent to the body as a whole. I find that claimant had no residual signs or symptoms based on his testimony wherein he stated that after the surgery "I had zero leg pain". (T. pg. 52, lines 15-17).

Respondents are directed to pay the nine percent permanent physical impairment rating in lump sum without discount. Claimant's attorney is entitled to the maximum attorney's fees allowed under Arkansas law for the benefits awarded herein.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

Ronald Reese - F600809

hear the testimony of the witnesses and to observe their demeanor, and without giving the benefit of the doubt to either party, the following Findings of Fact and

Conclusions of Law are 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 hereby accepted as fact.
- 3) The claimant has proven by a preponderance of the evidence that he sustained a compensable back injury on December 16, 2005, which is supported by objective medical findings.
- 4) Claimant has proven by a preponderance of the evidence that he is entitled to temporary total disability benefits from June 10, 2006, through June 22, 2006, and from September 30, 2006, through October 31, 2006.
- 5) Claimant has proven by a preponderance of the evidence that the respondents are responsible for all medical treatment contained in the record herein up to November 11, 2006, which includes but is not limited to the surgery performed by Dr. Jones on October 3, 2006.
- 6) Claimant has proven by a preponderance of the evidence that respondents should pay the claimant a nine percent permanent physical impairment rating pursuant to **AMA Guides to the Evaluation of Permanent Impairment, 4th Edition**.
- 7) Claimant is entitled to the maximum attorney's fees allowed by Arkansas law consistent with the findings herein.

AWARD

Respondents are herein directed and ordered to pay the claimant temporary

Ronald Reese - F600809

total disability benefits at the stipulated rate for the periods of June 10, 2006, through June 22, 2006, and September 30, 2006, through October 31, 2006. Further, respondents are ordered to pay the claimant for his nine percent permanent physical impairment. Said sums accrued shall be paid in a lump sum without discount. Further, respondents are to pay all medical expenses contained in the record herein up to November 11, 2006.

Maximum attorney's fees are herein awarded to the claimant's attorney, the Honorable Gregory Giles, pursuant to A.C.A. § 11-9-715. This award shall bear interest at the legal rate pursuant to A.C.A. § 11-9-809 until paid.

IT IS SO ORDERED.

S. DALE DOUTHIT
Administrative Law Judge

SDD/pjb