

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F511490

BILLY C. SMITH, EMPLOYEE

CLAIMANT

LEER LIMITED PARTNERSHIP, EMPLOYER

RESPONDENT NO. 1

**ST. PAUL FIRE & MARINE INSURANCE CO.
c/o ST. PAUL TRAVELERS,
INSURANCE CARRIER**

RESPONDENT NO. 1

SECOND INJURY FUND

RESPONDENT NO. 2

OPINION FILED OCTOBER 17, 2007

Hearing before Administrative Law Judge Barbara Webb on May 17, 2007 and July 19, 2007, in Pine Bluff, Jefferson County, Arkansas.

The claimant was represented by Mr. Kenneth E. Buckner, Attorney at Law, Pine Bluff, Arkansas.

Respondents No. 1 were represented by Mr. Robert H. Montgomery, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 was represented by Mr. David L. Pake, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held on the above-styled claim on May 17, 2007 and July 19, 2007, in Pine Bluff, Jefferson County, Arkansas, before Administrative Law Judge Barbara Webb. A Pre-hearing Order was entered in this case on April 3, 2007. The Pre-hearing Order set forth the stipulations offered by the parties and outlined the issues to be litigated and resolved at this hearing. A copy of the Pre-hearing Order was made Commission's Exhibit No. 1 to the hearing record. The following stipulations as submitted by the parties in the Pre-hearing Order and as amended on the record are hereby accepted:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The employer/employee/carrier relationship existed on September 1, 2004, when claimant sustained a compensable injury.
3. The claimant was earning an average weekly wage of \$645.00
4. The respondents have paid some medical benefits.

By agreement of the parties, the issues to be presented at the hearing are as follows:

1. The claimant's entitlement to temporary total disability benefits from March 22, 2005, to a date yet to be determined.
2. The claimant's entitlement to additional medical treatment as prescribed by Dr. Bruffett.
3. Controversion and attorney's fees.

On April 10, 2007, the Second Injury Fund was joined as a party to the proceeding. On May 22, 2007, the Second Injury Fund requested to be excused from attending the hearing since the only issues to be addressed were temporary total disability and additional medical treatment.

The record consists of a two volume transcript of the May 17, 2007 and July 19, 2007 hearings, consisting of the testimony of Billy Smith, Karen Neeley, Ian Beer, Sam Ngar and all documentary evidence consisting of Commission's Exhibit 1 (Pre-hearing Order); Claimant's Exhibit 1 (Medical Exhibits); Respondent No. 1's

Exhibit 1 (Employment Records); Joint Exhibit No. 1 (Deposition of Dr. Wayne Bruffett dated 7/13/07).

FACTUAL BACKGROUND

Billy Smith is 52 years of age (bd. 01/17/55) and graduated high school. Following high school, he successfully completed a master electrician correspondence course. At the time of his injury, Smith was employed by Leer Limited Partnership ("Leer") as the Maintenance Coordinator. His job duties included fixing all types of equipment and performing preventative maintenance. On September 1, 2004, Smith suffered a compensable work-related injury to his back while using a high-pressure washer to clean the interior of a shed during the performance of his job duties. At the time of his injury, he had a history of previous injury to his back with disc herniation which resulted in back surgery. He was originally treated conservatively by Dr. Adametz, using physical therapy, prescription medication, and lumbar epidural steroid injections. He continued to work under light duty with restrictions until Friday, March 18, 2005. On March 18, 2005, at the end of his shift, Smith was directed by Tom Butcher to check the burn-off oven. Smith told Butcher that he would check it on Monday since the plant manager had stated that there would be no more overtime authorized. Smith testified that he walked by the oven on his way out and observed that the oven was in a safe condition. On Monday morning, Smith reported for duty at his normal time. He was doing paperwork when Butcher reminded him of the oven. He got his tools and looked at the oven. He explained that he opened the doors, went through the starting process

and the oven lit up and ran without any problems. He watched it for approximately half an hour and then returned to other jobs. Later that morning, his supervisor, Sam Ngar, asked him to meet with the plant manager, Mr. Beer, in the break room. Beer advised him that he had created a big safety hazard by not working on the oven on Friday. When questioned about the restrictions of overtime, the plant manager told him that didn't matter. Smith testified that Beer continued to get louder and louder and told him that he was terminated. He returned to the Maintenance Department, put up his tools, and told his supervisor that he had to go home to get his truck to haul his toolbox. He returned to the plant a couple of hours later. A co-worker, Lavern Cotton, helped him get the tools loaded with a forklift. He left the plant twenty to thirty minutes later. He later received some information in the mail regarding continuing of insurance. At that time, he was working light duty. Smith testified that he had not worked anywhere else since that day.

After his injury in 2004, he was treated by Dr. Adametz and had two back surgeries. He was subsequently evaluated by Dr. Bruffett. Smith testified that he continues to have sharp pains in his back. He explained that Dr. Bruffett had proposed fusion surgery.

On cross-examination, Smith testified that he could drive a car and had driven the fifty miles to attend the hearing in Pine Bluff from his home in Monticello. Smith testified that he did not recall seeing the Employee Warning Notice regarding his actions on May 17-18, 2005, or that he was suspended for three days with directions to return to work on March 24, 2005. On the other hand, Smith testified

that Beer told him he was terminated. He explained that he had prior meetings and evaluations with his boss over job performance. He did not recall being asked to sign the Warning Notice or the notation made by Ms. Neeley that he refused to sign.

Karen Neeley testified that she was the Human Resource Assistant at Leer. She testified that she attended the meeting on March 21, 2005, with Beer, Smith, and Ngar. She explained that the purpose of the meeting was to inform Smith that he was written up for being rude to a supervisor and was going to be suspended. She took notes from the meeting. She testified that the Employee Warning Notice was shown to Smith at the meeting. She explained that Beer asked him to sign the notice to say that he had seen it and understood it, but Smith declined to sign. She said the only contact she had with Smith later was a call concerning his 401(k). She explained that the attendance policy for Leer is that if an employee does not show up for work or does not call in for three consecutive days, then they are considered voluntarily quit. She explained that each employee gets a copy of the attendance policy. She testified that Beer told Smith "Now I am suspending you, I don't want to — I don't want to lose you as an employee, so when you come back on Thursday, we're going to start all over again." While she could not recall Smith's response, she testified that she believed he understood.

Beer testified that he is the Plant Manager at Leer. He hired Smith and he was present at the meeting on March 21, 2005. He explained that the production supervisor had communicated to him that Smith was rude, very short, borderline belligerent, and refused to look at the oven when requested. He explained that

Smith had been spoken to on several occasions about his attitude. Beer testified that he read him the Employee Warning Notice and had a conversation with Smith about overtime, his attitude and his work performance. He described Smith as being attentive to him during the time he read the Notice. He explained the suspension and the return to work date. He also advised that he told Smith that when he returned that they would start fresh, but if his attitude and actions didn't correct after that, that he would be forcing Beer to take it to the final level of termination. He explained that he had told Smith on several occasions that he should work within his limitations and that if there were any issues that they would be addressed.

Sam Ngar testified that he worked as an engineer at Leer and was the supervisor over Maintenance. He testified that he attended the meeting with Beer and Smith when he was put on suspension for three days. He explained at the conclusion of the meeting, he walked him back to the Maintenance Department and told him to think it over and that he would see him in two to three days. He testified that Smith responded "I'm gone," and that he did not see him after their conversation. He explained that Smith was mad. He attempted to call him three or four times to get him to come back to work but could never get him to answer the phone. On cross-examination, he testified that the employees do not work overtime unless absolutely necessary but did not recall an announcement that there would be no more overtime a few weeks prior to the meeting.

_____Medical records reflect the claimant has had two prior back surgeries performed by Dr. Adametz, one performed several years ago and the most recent following an injury using a high pressure washer which occurred in 2004. He also received multiple injections and had physical therapy in 2005. He was referred to Dr. Bruffett for a second opinion by Dr. Adametz in August of 2006 when he continued to complain of back pain. Following the examination, Dr. Bruffett issued a report stating that Smith had two options: 1) to continue nonsurgical treatment or 2) consideration of operational intervention. In his report of August 18, 2006, Dr. Bruffett opined "I certainly think this type of pain is best treated nonsurgically". Smith returned to Dr. Bruffett in April of 2007. At that time, Bruffett recommended an up-to-date MRI to determine the condition of Smith's back. He noted that Smith suffered from "post-laminectomy syndrome with symptomatic disk degeneration and annular tear". He noted "In my previous note, I stated it was optimum if he could avoid surgery. Certainly, I don't want him to have to undergo such a major operation. However, nonsurgical things have failed. I think his options are to either have something done or to continue in his current state." He noted the claimant's desire to return to work and provide for himself. In his deposition, Bruffett testified that he was surprised to learn that the claimant had not looked for work in over two years. He was not aware that Smith had filed for Social Security benefits. He explained that due to the claimant's weight, the surgery would have to be performed anteriorly which would increase risk of injury to other organs, etc. He explained that

the decision to undergo surgery was the patient's decision and that he would perform the surgery if Smith wanted the surgery and it was approved.

CONTENTIONS

The claimant contends that he is entitled to temporary total disability benefits from March 25, 2005, to a date yet to be determined, and is entitled to additional medical treatment as prescribed by Dr. Bruffett.

The respondents contend that they have paid all appropriate benefits to which the claimant is entitled. The respondents have agreed to allow the claimant to return to Dr. Bruffett. Claimant reserves all other issues.

The Second Injury Fund has deferred to the outcome of litigation as to temporary total disability benefits and the right to additional medical treatment as prescribed by Dr. Bruffett.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The employer/employee/carrier relationship existed on September 1, 2004, when claimant sustained a compensable injury.
3. The claimant was earning an average weekly wage of \$645.00
4. The respondents have paid some medical benefits.
5. The claimant has failed to prove by a preponderance of the evidence that he is entitled to temporary total disability benefits from March 22, 2005, to a date yet to be determined.

6. The claimant has proven by a preponderance of the evidence that the additional medical treatment as prescribed by Dr. Bruffett, including the fusion surgery, is reasonable and necessary.
7. The claimant's attorney is not entitled to a statutory attorney's fee since the claimant has only proven entitlement to additional medical treatment.

DISCUSSION

Temporary Total Disability Benefits

The parties have stipulated that the claimant sustained a compensable injury to his lower back, an unscheduled injury. For an unscheduled injury, to be entitled to temporary total disability benefits, a claimant must remain in his healing period and be totally unable to earn wages. Ark. State Hwy. & Trans. Dept. v. Breshears, 272 Ark. 244, 613 S.W.2d 392 (1981). Temporary total disability is that period within the healing period in which an employee suffers a total incapacity to earn wages. J. A. Riggs Tractor Co. v. Etzkorn, 30 Ark. App. 200, 785 S.W.2d 51 (1990). 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. If the underlying condition causing the disability has become stable and if nothing further in the way of treatment will improve the condition, the healing period has ended. Nix v. Wilson World Hotel, 46 Ark. App. 303, 879 S.W.2d 457 (1994). For the purpose of defining disability, "any other employment" means any other

employment in lieu of the one in which the employee was injured. Stevens v. Mountain Home Sch. Dist., 41 Ark. App. 201, 850 S.W.2d 335 (1993).

_____ In the instant case, the claimant returned to work after his second injury to light duty. But for his own actions, Smith would have been provided continuing light-duty work. However, he violated an attendance policy that provided for termination if he failed to show up for work for three consecutive days. There is simply no authority for the proposition that an employer is required to provide light duty work for an injured employee who has violated a rule or policy of the employer that provides for immediate termination. Roark v. Pocahontas Nursing & Rehab., _____ Ark. App. _____ (CA 05-1226, May 10, 2006). The claimant contends that his absence was due to his belief that he had been terminated instead of suspended. However, the credible evidence demonstrates that the claimant was advised both verbally and in writing of the three-day suspension and the expected return to work date three days later. This is bolstered not only by the claimant's refusal to sign the Warning Notice but also by the supervisor's attempts to contact the claimant in the following week to locate the claimant for the purpose of getting him to return to work. Furthermore, the evidence is clear that Smith was not totally incapacitated from earning wages in that he states that he was ready, willing, and able to return to work in a light duty capacity. Therefore, claimant's request for temporary total disability benefits from March 22, 2005, to a date yet to be determined must fail.

Additional Medical Treatment

The records reflect that Smith underwent two previous surgeries performed by Dr. Adametz on his back, the most recent surgery performed in 2005, following a work-related incident in 2004. He subsequently returned to work with restrictions and worked until March 22, 2005, when he was terminated for violation of company policy. Smith continued to seek treatment and was ultimately referred to Dr. Bruffett for consideration of a third surgery when conservative treatments failed. Following the examination, Dr. Bruffett issued a report stating that Smith had two options: 1) to continue nonsurgical treatment or 2) consideration of operational intervention. In his report of August 18, 2006, Dr. Bruffett opined "I certainly think this type of pain is best treated nonsurgically". Smith returned to Dr. Bruffett in April of 2007. At that time, Bruffett recommended an up-to-date MRI to determine the condition of Smith's back. He noted that Smith suffered from "post-laminectomy syndrome with symptomatic disk degeneration and annular tear". He noted "In my previous note, I stated it was optimum if he could avoid surgery. Certainly, I don't want him to have to undergo such a major operation. However, nonsurgical things have failed. I think his options are to either have something done or to continue in his current state." He explained that due to the claimant's weight, the surgery would have to be performed anteriorly which would increase risk of injury to other organs, etc. He explained that the decision to undergo surgery was the patient's decision and that he would perform the surgery if Smith wanted the surgery and it was approved.

Ark. Code Ann. § 11-9-508 states that employers must provide all medical treatment that is reasonably necessary for the treatment of a compensable injury. What constitutes reasonable and necessary treatment under the statute is a question of fact for the Commission. Ganksy v. Hi-Tech Engineering, 325 Ark. 163, 924 S.W.2d 790 (1996); Geo Specialty Chem., Inc. v. Clingan, 69 Ark. App. 369, 13 S.W.3d 218 (2000). Respondents are responsible only for medical services which are causally related to the compensable injury.

In workers' compensation law, an employer takes the employee as he finds him, and employment circumstances that aggravate preexisting conditions are compensable. Williams v. L & W Janitorial, Inc., 85 Ark. App. 1 145 S.W.3d 383 (2004); Heritage Baptist Temple v. Robison, 82 Ark. App. 460, 120 S.W.3d 150 (2003). An aggravation of a preexisting non-compensable condition by a compensable injury is, itself, compensable. Id. Here, as in Williams, there is no dispute that the claimant's injury was compensable and that objective medical evidence established the current need for surgery. Rather, what is disputed is whether the surgery is reasonable and necessary in relation to the compensable injury given the fact that he also suffers from preexisting back problems. This is not a case where the claimant must establish that the compensable injury was the "major cause" of the need for the surgery since the claimant thus far is only seeking medical benefits and temporary total disability. Farmland Ins. Co. v. DuBois, 54 Ark. App. 141, 145, 923 S.W.2d 883, 885(1996). Instead, the respondents must take the claimant as they found him and the proper determination is whether there

is sufficient evidence to establish that the compensable injury was a factor in the need for the surgery. Williams v. L&W Janitorial, Inc., 85 Ark. App. 1, 145 S.W.3d 183 (2004).

In Davis v. Helena Chemical Co., claimant suffered from a preexisting lumbar degenerative condition before sustaining a compensable injury. Full Commission Opinion, filed August 3, 1999 (D406121). The Full Commission affirmed an administrative law judge's finding that claimant was entitled to additional medical treatment, stating:

The respondents' and the dissent's central argument in this case is that the treatment the claimant is presently receiving is because of an ongoing degenerative condition which would be occurring whether or not the claimant suffered an injury in 1984. However, this argument overlooks the fact that the claimant's previously asymptomatic degenerative process physically progressed and became symptomatic because of his 1984 compensable injury . . . the compensable injury, not some speculative event, is what resulted in the claimant's present condition.

Id.

The Full Commission later upheld a finding of compensability where symptoms of claimant's preexisting condition were asymptomatic for five years prior to the compensable event. Jerry Hambelton v. Guy King & Sons, Inc. & Bituminous Casualty Corp., Full Commission Opinion, filed February 22, 2001 (E904812). The Commission held that a preponderance of the evidence showed that claimant's symptoms were the result of his compensable injury, despite the fact that claimant had a preexisting ongoing degenerative process. Id. at 19.

In the instant case, the medical opinion of Dr. Bruffett supports the reasonable and necessary treatment of the claimant, including the recommended

fusion surgery. Although Dr. Bruffett has indicated that non-surgical treatment is a preference due to the inherent risks of surgery, he concludes that the claimant's only option to improve his current condition is the fusion surgery.

Based on the clear weight of the medical evidence in this case from claimant's treating physicians, I find that the medical treatment recommended by Dr. Bruffett, including the fusion surgery, is reasonable and necessary and related to the compensable injury.

Controversion

Based on my award of medical benefits only, I find that claimant's attorney is not entitled to a statutory attorney's fee.

ORDER

For the reasons discussed herein, Respondents No. 1 are directed to pay additional medical benefits in accordance with the findings of fact and conclusions of law set forth herein.

IT IS SO ORDERED.

BARBARA WEBB
Administrative Law Judge