

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F407708

MICHAEL TIMBERLAKE, EMPLOYEE

CLAIMANT

JOHNSON EMPLOYMENT SERVICES, LLC, EMPLOYER

RESPONDENT

**TRAVELERS INSURANCE COMPANY,
CARRIER/TPA**

RESPONDENT

OPINION FILED JULY 13, 2007

Hearing before Administrative Law Judge O. Milton Fine II on April 24, 2007, in Searcy, White County, Arkansas.

Claimant *pro se*.

Respondents represented by Mr. Phillip Cuffman, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

On April 24, 2007, the above-captioned claim was heard in Searcy, Arkansas. A pre-hearing conference took place on February 5, 2006. A Prehearing Order entered that same day pursuant to the conference was admitted without objection as Commission Exhibit 1. At the hearing, the parties confirmed that the stipulations, issues, and respective contentions were properly set forth in the Order.

Stipulations

At the hearing, the parties discussed the stipulations set forth in Commission Exhibit 1, which I accept. They are the following:

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.

2. The Claimant sustained a compensable injury to his low back on or about July 13, 2004 and that temporary total and medical benefits were paid until October 30, 2006.
3. The Claimant's compensation rates are \$129.00 for temporary total disability based on an average weekly wage of \$194.00.

Issues

At the hearing, the parties discussed the issues set forth in Commission Exhibit 1.

They are as follows:

1. Whether the Claimant is entitled to continuing temporary total disability benefits and additional medical care on and after October 30, 2006.
2. Whether the Claimant was entitled to benefits during the period of his incarceration.

Contentions

Claimant:

1. The Claimant contends that he is entitled to continuing temporary total disability benefits and additional medical care.

Respondents:

1. The Respondents contend that they have paid all appropriate benefits. The Claimant was released to full duty by his treating physician as of October 23, 2006. Temporary total disability benefits were discontinued on October 30, 2006 based upon his release. He subsequently re-injured his back moving furniture at home and Respondents declined to pay for treatment related to this event.

Respondents deny that they owe additional temporary total disability benefits or medical benefits related to treatment necessitated by injury moving furniture.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record as a whole, including medical reports, documents, and other matters properly before the Commission, and having had an opportunity to hear the testimony of the Claimant/witness and to observe his demeanor and to consider the deposition testimony of Dr. Harold Chakales, I hereby make the following findings of fact and conclusions of law in accordance with Ark. Code Ann. § 11-9-704 (Repl. 2002):

1. The Arkansas Workers' Compensation Commission has jurisdiction over these claims.
2. The stipulations set forth above are reasonable and are hereby accepted.
3. Claimant has failed to prove by a preponderance of the evidence that he was entitled to temporary total disability benefits and additional medical care on and after October 30, 2006.
4. Claimant was not entitled to temporary total disability benefits during the period of his incarceration in the Arkansas Department of Correction.
5. Claimant has not met his burden of showing that Respondents failed to pay him temporary total disability benefits after he was released from incarceration but before he reached maximum medical improvement.

CASE IN CHIEFSummary of Evidence

_____ Claimant was the sole witness at the hearing. In addition to the prehearing order discussed above, by agreement of the parties the record was left open for the admission of Joint Exhibit 1, the transcript of the deposition of Dr. Chakales taken April 23, 2007 and consisting of 16 pages of testimony and 17 pages of medical exhibits.

Testimony

Michael Timberlake. Because of Claimant's *pro se* status, and without objection from Respondents, I initiated the questioning of Claimant, and then afforded Respondents the opportunity to question him. His testimony was as follows on direct examination:

Claimant testified that his full name is Michael Edward Timberlake. He is 31 years old and lives in Judsonia. On July 13, 2004, he sustained a compensable injury to his low back. That day, he was working for Respondent Johnson Employment Services at Bingham. It is a rubber roller factor in Searcy. He was unloading rollers from what is called a "hot pot." The rollers weigh from 220 to 350 pounds. Each worker gets on an end of the roller and the rollers are thrown onto a table. At the time he was performing this task, Claimant was twisting and lifting at the same time. He testified that he felt a sharp pain in his lower back and was not sure if he had pulled a muscle. When he went to grab another roller, the pain went to his groin area. Claimant stated that he immediately stopped and went to a supervisor. The supervisor told him to contact Respondent Johnson immediately, so he did. Nicole Hare, who was working at Respondent Johnson, picked Claimant up and took him to the emergency room at White County Memorial Hospital. He was x-rayed and given pain shots. From there, he went to see another physician.

According to Claimant, in October 2006 Dr. Harold Chakales asked him if he was ready to return to work and Claimant answered yes. The doctor told him to “give it a try”—that he could return to work and that he would see him in three to six weeks. Dr. Chakales gave him no lifting restrictions. Claimant stated that he was still experiencing pain and receiving pain medication.

Although he was released, Claimant did not return to work, although he stated that he looked for work and filled out some job applications. Approximately two weeks after the release, he was at his mother’s home, helping her move furniture, when he started hurting. He testified: “I went to scoot one end of the couch and my back started burning again and I started having muscle spasms because it was going down my left leg, just as it had been beforehand whenever I got hurt the first time.” Claimant stated that he stopped what he was doing and waited that day to see if the pain would go away. He called Dr. Chakales the next day and went to see him.

Claimant testified that since then, he has seen the doctor one more time. Claimant was told that he would not receive any more benefits because he had already been released and that this was a new back injury. He stated that Dr. Chakales wanted to put a TNS unit on him and perform another MRI, but that Respondent Travelers refused to pay. So, the doctor simply gave him pain medication and muscle relaxers. He also wanted Claimant to return to physical therapy, but Claimant stated that he could not afford it.

Claimant testified that he was imprisoned in the Arkansas Department of Correction from February 11-September 12, 2005. During his incarceration, Respondents did not pay benefits. He testified that while he informed Respondent Travelers of his release

immediately, Travelers would not resume payments until he had been seen by their doctor. Claimant stated that his benefits resumed in November 2005.

On cross-examination, Claimant testified that when he was injured on the job, he came under the care of Dr. Warnock after visiting the emergency room. Claimant stated that he saw Warnock, who was not his family doctor, a few times before being referred to Dr. Zach Mason in Little Rock. He saw Dr. Mason two times at most, and then went to Dr. Wilburn. It was during his time with Dr. Wilburn that Claimant went to prison, so his visits to him were widely separated. Claimant at first testified that he did not know if Wilburn would have released him or not. He later admitted that Dr. Wilburn released him in October 2005, after he was released from prison. Claimant then sought a change of physician from the Commission and went under the care of Dr. Chakales, who found that there was still something wrong.

Claimant stated that he was still having back pain, radiating into his leg, when he first saw Dr. Chakales around March 1, 2006. Because of Claimant's size, the doctor did not think open surgery on him was advisable. In May 2006 Dr. Chakales performed a percutaneous discectomy on Claimant. He testified that the surgery helped in that he did not have as many muscle spasms as before. But he was still having to take pain medication and muscle relaxers at that time, including when Chakales released him.

He testified again that it was not long after this release that he was injured while scooting furniture at his mother's house. He denied that he was lifting anything during that episode—he stated that he “was still kind of gun shy to—to try and lift a lot.” He stated that the back pain was worse than ever after this incident, and radiated into his leg. Claimant has seen Dr. Chakales one time, in April 2006, since this incident.

He described his current situation as follows:

I've had steady spasms down my left side and my back is in a lot of pain. Not just steady, constant pain but it—it comes and goes. But the—down my left leg, I've had a lot of trouble with it. I've had a lot of trouble finding another doctor than I can afford to take over where Dr. Chakales had to leave off. Right now I have bills at Dr. Chakales' office because of the stop payment and he won't see me anymore until I get those taken care of. I've had to find other means and doctors have been bouncing me around since that time. Right now, I am looking into—I am going to a local clinic—Kensett Clinic—for a low income person. And they are looking into sending me to—I believe it's UCLA in Little Rock—UAMS, UAMS—and to go ahead with my treatment, whatever it may be, and to further investigate my back pain and my leg pain.

On redirect, Claimant described the furniture-moving incident in greater detail. The sofa they were scooting was not a sleeper, but was three cushions in length and had wooden legs. The floor had thin carpeting. He was holding the arm of the couch in his right hand and using his left hand to brace the back of the couch as he scooted it from the right to the left. It was while scooting it that he felt the pain.

Dr. Harold Chakales. As stated above, Dr. Chakales was deposed on April 23, 2006, and the transcript thereof was admitted as Joint Exhibit 1. His testimony was as follows:

Dr. Chakales stated that he is a board-certified orthopedic surgeon. He first saw Claimant on March 1, 2006. He had been furnished with some of Claimant's medical information. The doctor did a history and a physical on him and made a diagnosis of lumbar disc syndrome with chronic sciatica.

Given the age of the diagnostic film he had been provided, Dr. Chakales stated that he wanted another MRI done, along with an EMG study. Both were done on March 8, 2006. The MRI, according to the doctor, "showed a bulging disc at the 4,5 level with some protrusion on the left side and degenerative disc at L5-S1." These findings were consistent with Claimant's complaints of chronic back and left leg pain. He stated that "[t]he EMG

showed some chronic S1 nerve root irritation on the left, and that EMG was done by Michael Chesser.” This finding was also consistent with Claimant’s complaints.

He next saw Claimant on March 20, 2006. At that time, Dr. Chakales concluded that he had a bulging HNP at the L4-L5, left-sided, with chronic nerve root irritation. In his report, the doctor stated that given Claimant’s size, open surgery was not advisable. He instead performed a percutaneous discectomy on May 4, 2006 at L4-L5. He considered doing one at L5-S1 as well, but was unable to reach it because of Claimant’s size. The doctor prescribed the procedure as follows:

[T]hat’s putting him under a MAC anesthesia, having the patient—I do a technique where he lays on his side; you take a long probe about that long (indicating), I’d say 12 to 16 inches in length, and you actually stick it from a paralumbar approach into the disc space at L4-5. And what you do is shrink down—you actually ablate, or remove, part of the central portion of the disc. And this causes any other protruding disc to collapse down and take the pressure off the spinal cord.

The doctor next saw Claimant on May 12, 2006. He noted on that date that Claimant had relief of his pain—his sciatica had improved. Claimant had back spasms, but Dr. Chakales testified that they are a common consequence of the surgery. To relieve this condition, the doctor gave a trigger point injection. After the next visit, on June 21, 2006, Claimant reported that he was still doing better. Dr. Chakales next saw him on October 16, 2006, and released him to return to work on the 23rd. The doctor testified that he considered Claimant to have reached maximum medical improvement on that date, when he would have returned to work. When asked whether Claimant was permitted to return to work on the 23rd with or without restrictions, the doctor stated:

I think you need to give somebody about six months to heal. He had his surgery on May the 4th. This is an extremely large person. I would

recommend anybody who had this to take it easy for the first six to eight weeks following surgery.

On November 8, 2006, Claimant saw Dr. Chakales again and told him that he had injured his back while helping his mother move. He complained of low back pain with left-sided sciatica. Until this, the sciatica had “[r]eally diminished quite a bit” In the doctor’s opinion, Claimant’s condition worsened as a result of the moving injury. There was no objective evidence that the injury resulted in new damage to Claimant’s back, but he had a positive sciatic stretch and complained of sciatica. In Dr. Chakales’ opinion, Claimant “aggravated a preexisting condition” when he moved the furniture. This extended his period of disability until December 13, 2006, when it concluded again and Dr. Chakales felt that he had reached MMI. When Claimant returned to the doctor on April 9, he had aggravated the condition again.

Dr. Chakales testified that Claimant’s prognosis is “guarded.” He would not recommend further surgery due to his size. While an open fusion is possible in the future, it could not be accomplished without Claimant losing weight. Claimant was scheduled to return to him in May. Right now, the doctor is only rendering conservative treatment—pain pills and muscle relaxers, with the possibility of a cortisone injection or epidural steroid.

As for an impairment rating, Dr. Chakales testified: “His anatomical rating, in the 4th edition of the Guideline from the AMA, they have Category 2 and 3, he falls between that. He is approximately 10 (ten) percent to the body as a whole.”

When asked by Claimant whether it was “more likely I wouldn’t be having these problems now had I not been injured in the first place,” Dr. Chakales replied that “[y]ou can’t say that. You might have.”

Records

The medical records of Claimant that were an exhibit to Dr. Chakales' deposition and are part of Joint Exhibit 1 reflect the following:

On March 1, 2006, Claimant presented to Dr. Chakales with complaints of pain that began at work on July 13, 2004. He has not worked since the time of the accident. He complained of chronic low back pain, with pain radiating into his left leg, and of some numbness from the buttocks up. The doctor notes that a myelogram/CT scan obtained on December 3, 2004 showed a bulging HNP at L5-S1. Claimant was described as "obese and weighs >350 lbs." He was also described as "walk[ing] with an antalgic gait and ha[ving] increased lumbar lordosis." Dr. Chakales diagnosed him as having lumbar disc syndrome with chronic sciatica, and recommended a new MRI of the lumbar spine and an EMG/NCV of his back and both legs. The MRI on March 8, 2006 showed "moderate degenerative disc disease at L5-S1" and "[l]eft paracentral and foraminal disc protrusion at L4-L5, causing the left lateral recess stenosis. This displaces the traversing nerve roots medially at this level." The EMG on March 8 was normal except for "[p]robable mild chronic left S1 radiculopathy."

On March 20, 2006, Dr. Chakales wrote Respondent Travelers that his diagnoses were

1. Bulging HNP, L4-5, predominantly on the left side, with chronic nerve root irritation.
2. Moderate degenerative disc disease, L5-S1.

Because of Claimant's size, the doctor in his letter did not recommend open surgery but instead opined that Claimant might be a candidate for percutaneous discectomy at L4-L5, following a discogram.

On April 17, 2006, Dr. Chakales noted that Respondent Travelers denied the discogram, but approved the percutaneous discectomy. The procedure was set up for L4-L5, and possibly L5-S-1. Claimant presented with most of his symptoms in his left leg. The surgery was performed on May 4. On May 12, he presented with some back pain and had a trigger point, which Dr. Chakales injected. His x-rays looked good. The leg pain was relieved. On June 21, 2006, six weeks post-op, Claimant was presenting as having less back pain and sciatica. The letter from Dr. Chakales to Respondent Travelers on October 16, 2006 reads:

Since my last letter, Mr. Timberlake was seen in my office on June 21, 2006. He had percutaneous discectomy and postoperatively was seen today in my office. At this time he continues to have some low back pain, but the percutaneous discectomy has been of benefit to him.

I will release him to return to work as of Monday, October 23, 2006. I will see him in approximately 4-6 weeks, repeat the x-rays, and consider releasing him from my care.

On November 8, 2006, Claimant returned to Dr. Chakales and stated that “[h]e injured his back again last week while helping his mother move.” He presented with “some low back pain and left-sided sciatica.” The doctor determined that he was temporarily totally disabled for two weeks and prescribed pain pills and muscle relaxers.

Claimant visited Dr. Chakales again on November 22. The note states: “He has reinjured his back. He was moving some light furniture when he twisted his back and began to have problems. This is an aggravation of his preexisting condition.”

The note for December 13, 2006 reflects that Claimant was “doing well from the percutaneous discectomy and then reinjured his back in November.” He again presented

with complaints of low back pain and sciatica. He was continued on pain medication and muscle relaxers.

Claimant went to the emergency room at St. Vincent's Hospital complaining of low back pain. He was then referred back to Dr. Chakales, who saw him on April 9, 2007. The x-ray of his lumbar spine "is not the best quality, but shows the lumbar degenerative disease." The doctor noted, *inter alia*, that Claimant had "straightening of the lumbar lordosis." He presented with recurrent back and leg pain that was worse on his left side. Claimant was noted as having "an ongoing problem of exogenous obesity with lumbar disc syndrome and chronic root irritation." He was prescribed muscle relaxers and pain medication and scheduled for a follow-up visit in one month.

ADJUDICATION

A. Temporary Total Disability

Claimant asserts that he is entitled to temporary total disability benefits from October 30, 2006, when Respondents ceased paying benefits, to an indeterminate future date. Claimant's compensable injury to his back is unscheduled. See Ark. Code Ann. § 11-9-521 (Repl. 2002). An employee who suffers a compensable unscheduled injury is entitled to temporary total disability compensation for that period within the healing period in which he or she has suffered a total incapacity to earn wages. *Ark. State Hwy. & Transp. Dept. v. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981). The healing period ends when the underlying condition causing the disability has become stable and nothing further in the way of treatment will improve that condition. *Mad Butcher, Inc. v. Parker*, 4 Ark. App. 124, 628

S.W.2d 582 (1982). Also, a claimant must demonstrate that the disability lasted more than seven days. Ark. Code Ann. § 11-9-501(a)(1).

The medical records and the testimony of Dr. Chakales reflect that on October 16, 2006, he released Claimant to return to work as of on October 23, 2006. The doctor's testimony was that as of the 23rd, he had reached the end of his healing period. Temporary total disability benefits cannot be awarded after the claimant's healing period has ended. *Elk Roofing Co. v. Pinson*, 22 Ark. App. 191, 737 S.W.2d 661 (1987). Furthermore, Claimant admitted in his testimony that he was not placed under any lifting restrictions. In fact, he testified that upon his release, he sought work and filled out job applications. He clearly did not have a total incapacity to earn wages on October 23, 2006. For these reasons, Respondents did nothing improper in terminating his benefits on October 30, 2006.

That, however, leaves the question of the effect of his November 2006 injury. Claimant testified that he was helping his mother move a couch when he injured his back again. Claimant returned to Dr. Chakales on November 8, 2006, and stated that he had injured his back again the previous week while helping his mother move. He presented with some low back pain and left-sided sciatica. The doctor found on the 8th that Claimant was temporarily totally disabled for two weeks and prescribed pain pills and muscle relaxers. Dr. Chakales' testimony and notes reflect that in his opinion, Claimant aggravated a preexisting condition when he moved the couch. The doctor testified that this extended his period of disability until December 13, 2006, when it concluded again. He further opined that when Claimant returned to the doctor on April 9, he had aggravated the condition again. Respondents dispute this position. They contend that they are not liable for an injury occasioned by Claimant's moving furniture at his mother's home.

As stated previously, Claimant had reached the end of his healing period before this alleged injury. As Dr. Chakales opined, this could only be an aggravation. An aggravation is a new injury resulting from an independent incident. *Farmland Ins. Co. v. DuBois*, 54 Ark. App. 141, 923 S.W.2d 883 (1996). An aggravation is a new injury with an independent cause and, therefore, must meet the requirements for a compensable injury. *Crudup v. Regal Ware, Inc.*, 341 Ark. 804, 20 S.W.3d 900 (2000).

Arkansas Code Annotated § 11-9-102(4)(A)(i) defines "compensable injury":

(i) An accidental injury causing internal or external physical harm to the body . . . arising out of and in the course of employment and which requires medical services or results in disability or death. An injury is "accidental" only if it is caused by a specific incident and is identifiable by time and place of occurrence[.]

A compensable injury must be established by medical evidence supported by objective findings. Ark. Code Ann. § 11-9-102(4)(D) (Repl. 2002). "Objective findings" are those findings which cannot come under the voluntary control of the patient. *Id.* § 11-9-102(16). The element "arising out of . . . [the] employment" relates to the causal connection between the claimant's injury and his or her employment. *City of El Dorado v. Sartor*, 21 Ark. App. 143, 729 S.W.2d 430 (1987). An injury arises out of a claimant's employment "when a causal connection between work conditions and the injury is apparent to the rational mind." *Id.* If the claimant fails to establish by a preponderance of the evidence any of the requirements for establishing compensability, compensation must be denied. *Mikel v. Engineered Specialty Plastics*, 56 Ark. App. 126, 938 S.W.2d 876 (1997).

Clearly, Claimant did not show that his alleged injury while moving his mother's couch arose out of or was in the course of his employment by Respondent Johnson.

Moreover, the medical records in evidence do not have any objective findings of a back injury by Claimant until April 9, 2007, when Dr. Chakales noted that he had a straightening of the lumbar lordosis. See *Estridge v. Waste Management*, 343 Ark. 276, 33 S.W.3d 167 (2000)(straightening of lordotic curve is an objective finding). Tying an objective finding to an event that occurred approximately five months before would require speculation and conjecture. But speculation and conjecture cannot serve as a substitute for proof. *Dena Construction Co. v. Herndon*, 264 Ark. 791, 796, 575 S.W.2d 155 (1979). In short, Claimant has not met his burden of proof that he sustained a compensable injury as a result of moving the sofa. Hence, he is not entitled to temporary total disability benefits for this period. I note that Dr. Chakales mentioning in his deposition that Claimant aggravated his condition again prior to his April 9, 2006 visit. But neither the doctor's nor Claimant's testimony, nor the medical records, mention a specific cause. Therefore, Claimant cannot meet his burden of proof regarding entitlement to benefits for this period.

B. Additional Medical Treatment

Claimant also argues that he is entitled to reasonable and necessary medical treatment on and after October 30, 2006. However, that is moot in light of the above findings.

C. Entitlement to Benefits During Incarceration

Claimant contends that his temporary total disability benefits were improperly denied while he was incarcerated, and for a period thereafter. His un rebutted testimony at the hearing was that he was incarcerated in the Arkansas Department of Correction from February 11 to September 12 of 2005 and that during his incarceration, Respondents did not pay benefits. He further testified that although he informed Respondent Travelers

immediately when he released from confinement, Travelers refused to resume payments until he had been seen by their doctor. He stated that his benefits resumed in November 2005.

Claimant has not cited, and I could not locate, any authority in support of his contention that he was entitled to benefits while incarcerated. However, Ark. Code Ann. § 11-9-812(a) provides:

(a)(1) When any person who receives workers' compensation benefits is incarcerated in an institution under the control of the Department of Correction, the inmate's spouse or, if no spouse, the inmate's minor dependent children, may petition the Workers' Compensation Commission to award to the spouse or minor dependent children the inmate's workers' compensation weekly disability benefits for the period of the claimant's incarceration.

(2) If the inmate has no surviving spouse or surviving dependent children, the department may petition the commission to award to the department the amount of the workers' compensation weekly disability benefits for the period of the claimant's incarceration necessary to reimburse the department for the cost of incarcerating the inmate.

A general provision must yield when there is a specific statute involving the particular matter. See *Ozark Gas Pipeline Corp. v. Arkansas Public Service Commission*, 342 Ark. 591, 29 S.W.3d 730 (2000). Therefore, I find that § 11-9-812(a) controls in determining this issue. In *Wheeler Const. Co. v. Armstrong*, 73 Ark. App. 146, 41 S.W.3d 822 (2001), the Arkansas Court of Appeals held that temporary total disability benefits fall under this section. In the claim at bar, the record does not reflect that either Claimant's spouse, surviving minor children (if he has either—the record does not so indicate) or the Department of Correction sought to claim his benefits for this period. In *Gazaway v. Greene County Equalization Bd.*, 314 Ark. 569, 864 S.W.2d 233 (1993), the Arkansas Supreme Court stated:

The phrase *expressio unius est exclusio alterius* is a fundamental principle of statutory construction that the express designation of one thing may properly be construed to mean the exclusion of another. *Chem-Ash, Inc. v. Arkansas Power & Light Co.*, 296 Ark. 83, 751 S.W.2d 353 (1988); *Venhaus v. Hale*, 281 Ark. 390, 663 S.W.2d 930 (1946).

Under this principle, the failure to include claimants incarcerated in the Arkansas Department of Correction among those eligible to receive benefits during the period of incarceration shows that such claimants are excluded from eligibility. Hence, Claimant was not entitled under this provision to temporary total disability benefits during the period of his imprisonment.

As for his testimony that Respondents did not resume paying his benefits until November 2005, this conflicts with the stipulation that benefits were paid until October 30, 2006. Moreover, the only evidence of this non-payment is Claimant's testimony, and he was unable to pinpoint when Respondents allegedly began paying him again. From this scant evidence, I am unable to find that Claimant has met his burden of proof that he is entitled to additional benefits.

CONCLUSION

Claimant must prove that he is entitled to additional temporary total disability benefits and medical treatment. He has not done this. Therefore, his claim must be, and hereby is, denied and dismissed.

IT IS SO ORDERED.

Hon. O. Milton Fine II
Administrative Law Judge