

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F407633

LARRY WINNER, Employee	CLAIMANT
LIFTRUCK PARTS & SERVICE, Employer	RESPONDENT
CONTINENTAL CASUALTY COMPANY, Carrier	RESPONDENT

OPINION FILED JANUARY 4, 2007

Hearing before ADMINISTRATIVE LAW JUDGE GREGORY K. STEWART in Fort Smith, Sebastian County, Arkansas.

Claimant represented by EDDIE H. WALKER, JR., Attorney, Fort Smith, Arkansas.

Respondents represented by FRANK NEWELL, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

On December 11, 2006, the above captioned claim came on for a hearing at Fort Smith, Arkansas. A pre-hearing conference was conducted on November 8, 2006, and a pre-hearing order was filed on November 9, 2006. 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 stipulation:

1. The prior opinion of December 14, 2005 is final.

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

1. Claimant's entitlement to additional medical treatment as recommended by Dr. Raben.

2. Additional temporary total disability benefits from October 24, 2006 through a date yet to be determined.

3. Attorney fee.

At the time of the hearing the parties agreed that there was no longer a dispute with regard to claimant's entitlement to additional medical treatment. Furthermore, claimant

modified his contentions with regard to disability benefits to request temporary partial disability benefits beginning October 24, 2006 and continuing through a date yet to be determined.

The claimant contends he is entitled to temporary partial disability benefits beginning October 24, 2006 and continuing through a date yet to be determined as well as an appropriate attorney fee.

The respondents contend the claimant is not entitled to temporary partial disability benefits.

From a review of the record as a whole, to include medical reports, documents, and other matters properly before the Commission, and having had an opportunity to hear the testimony of the witness and to observe his demeanor, the following findings of fact and conclusions of law are made in accordance with A.C.A. §11-9-704:

#### FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The prior opinion of December 14, 2005 is final.
2. Claimant is entitled to temporary partial disability benefits beginning October 24, 2006 and continuing through November 21, 2006. Claimant is entitled to temporary partial disability benefits at the rate of \$213.00 per week.
3. Respondent has controverted claimant's entitlement to all unpaid temporary partial disability benefits.

#### FACTUAL BACKGROUND

The claimant is a 48-year-old man who suffered a compensable injury while working for respondent on June 28, 2004 when several pallets fell down on him striking him on the top of his head, his back, and leg. As a result of claimant's compensable injury he has been evaluated by various physicians and on February 24, 2005 claimant was granted a

change of physician to Dr. Tony Raben, neurosurgeon. A prior hearing was conducted in this case on November 14, 2005, and an opinion was filed on December 14, 2005 finding that claimant was entitled to additional medical treatment; specifically, additional testing as recommended by Dr. Raben. That opinion was not appealed and the parties have stipulated that it is final.

The medical reports indicate that claimant has primarily been treated conservatively with physical therapy, medication, and an injection.

Beginning sometime in 2005 the claimant began performing some employment for a friend of his, James Garner. Claimant testified that he performs various job duties for Garner and is paid \$8.00 per hour. Claimant testified that he could not work eight hours a day in his present condition and that he currently works only three to five hours per day.

Claimant has filed this claim contending that he is entitled to temporary partial disability benefits beginning October 24, 2006 and continuing through a date yet to be determined.

### ADJUDICATION

A claimant requesting temporary partial disability benefits has the burden of proving by a preponderance of the evidence that they remain within their healing period and that they suffer a partial incapacity to earn wages. *Arkansas State Highway & Transportation Department v. Breshears*, 272 Ark. 244, 613 S.W. 2d 392 (1981). After reviewing the evidence in this case impartially, without giving the benefit of the doubt to either party, I find that claimant is entitled to temporary partial disability benefits beginning October 24, 2006 and continuing through November 21, 2006.

Initially, I find that claimant has remained within his healing period. The hearing transcript from November 14, 2005 contains the history of claimant's medical treatment from various treating physicians including Dr. Raben. At the most recent hearing claimant

introduced additional medical reports reflecting medical treatment from Dr. Raben. For instance, in July 2006 Dr. Raben ordered the claimant to receive a steroid injection. Subsequent medical reports from Dr. Raben indicate that this injection was successful in improving the claimant's neck pain. In October 2006 Dr. Raben ordered an MRI study to further evaluate claimant's condition. As a result of that MRI study Dr. Raben has referred claimant to Dr. Piechal for additional medical treatment. Accordingly, based upon my review of the medical evidence, I find that claimant has remained within his healing period for his compensable neck injury.

I also find that claimant has suffered a partial incapacity to earn wages for a period of time beginning October 24, 2006 and continuing through November 21, 2006. On October 24, 2006, Dr. Raben wrote a letter excusing claimant from work.

Larry Winner is under my care. He was in my office today for a visit. Please excuse him from work until he returns to discuss the results of his MRI study.  
(Emphasis added.)

Even though Dr. Raben took claimant off work completely, claimant continued to perform limited job duties for James Garner. According to claimant's testimony he would work some three to five hours several days per week for Garner. However, it was claimant's testimony that he could not work a full eight hours per day. Based upon this evidence, I find that claimant suffered a partial incapacity to earn wages beginning October 24, 2006.

I find that claimant's partial incapacity to earn wages continued until November 21, 2006. On that date claimant presented to Dr. Raben for a discussion of the MRI results. Following that discussion Dr. Raben referred claimant to Dr. Piechal for additional medical treatment. Dr. Raben's medical report of November 21, 2006 does not indicate one way or the other whether claimant is capable of returning to work. However, the report from Dr. Raben which indicated that claimant should be excused from work indicated that he

should be excused only until claimant returned to discuss the results of the MRI study. That discussion occurred on November 21, 2006. Given that claimant has the burden of proving by a preponderance of the evidence that he continued to suffer a partial incapacity to earn wages subsequent to that date, I find that claimant has failed to meet that burden of proof based upon the report of Dr. Raben dated October 24, 2006, and the lack of any medical opinion from him extending claimant's inability to work subsequent to the discussion of the MRI study which occurred on November 21, 2006.

Accordingly, for the foregoing reasons, I find that claimant is entitled to temporary partial disability benefits beginning October 24, 2006 and continuing through November 21, 2006.

I also find that claimant is entitled to temporary partial disability benefits at the rate of \$213.00 per week. According to claimant's testimony he earned \$12.00 per hour while working for the respondent at the time of his injury. This would have resulted in an average weekly wage of \$480.00 per week at the time of his injury. Claimant testified that he is currently working some three to five hours per day at the rate of \$8.00 per hour for Garner. Based upon claimant's testimony, as well as documentary evidence presented by the claimant, I find that he was working an average of 20 hours per week for Garner which would result in an average weekly wage of \$160.00. Thus, the difference between claimant's pre-injury average weekly wage and his current average weekly wage is \$320.00 which results in a temporary partial disability rate of \$213.00 per week.

#### ORDER

Claimant has met his burden of proving by a preponderance of the evidence that he is entitled to temporary partial disability benefits beginning October 24, 2006 and continuing through November 21, 2006. Claimant is to be paid temporary partial disability benefits at the rate of \$213.00 per week. Respondent has controverted claimant's

entitlement to all unpaid temporary partial 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 temporary total disability benefits awarded. This fee is to be paid one-half by the carrier and one-half by the claimant.

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