

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F613862

DANNY BURTON, Employee	CLAIMANT
ROBINSON AVIATION RVA, INC., Employer	RESPONDENT
COMMERCE & INDUSTRY INSURANCE COMPANY, Carrier	RESPONDENT

OPINION FILED JUNE 12, 2008

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

Claimant represented by KENNETH OSBORNE, Attorney, Fayetteville, Arkansas.

Respondents represented by MELISSA WOOD, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

On May 14, 2008, the above captioned claim came on for a hearing at Springdale, Arkansas. A pre-hearing conference was conducted on February 27, 2008, and a pre-hearing order was filed on February 29, 2008. 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.
3. The claimant sustained a compensable injury to his left shoulder, left knee, and low back on December 13, 2006.
4. The claimant was earning an average weekly wage of \$1,015.56 which would entitle him to compensation at the weekly rates of \$488.00 for total disability benefits and \$366.00 for permanent partial disability benefits.

5. Respondents have paid permanent partial disability benefits based on impairment ratings of 12% to the shoulder and 11% to the left lower extremity.

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

1. Claimant's entitlement to additional medical treatment for the lumbar spine injury.

2. Temporary total disability benefits from January 12, 2008 through a date yet to be determined.

3. Mileage.

4. Attorney fee.

Subsequent to the pre-hearing conference the claimant underwent a second shoulder surgery and the respondent accepted liability for that medical treatment. Respondent also began paying claimant temporary total disability benefits as of May 8, 2008. The parties also resolved the issue of mileage. Based upon that agreement, the issues remaining for litigation involve claimant's entitlement to additional medical treatment from Dr. Routsong for his sacroiliac joint; claimant's entitlement to temporary total disability benefits from January 12, 2008 through May 7, 2008; and respondent's entitlement to a credit for overpayment of temporary total disability benefits from June 6, 2007 through July 31, 2007.

The claimant contends that he is entitled to additional medical treatment from Dr. Routsong. He also requests temporary total disability benefits beginning January 12, 2008 and continuing through May 7, 2008.

The respondent contends that claimant is not entitled to additional medical treatment for his compensable back injury. In addition, respondent contends that claimant's requested period of temporary total disability benefits beginning on January 12, 2008 is directly related to his back which is not causally related to his injury. Finally, respondent contends that it overpaid claimant temporary total disability benefits beginning

June 6, 2007 through July 31, 2007. Respondent contends that claimant had reached maximum medical improvement for his shoulder and knee as of June 6, 2007 or at least July 5, 2007.

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 stipulations agreed to by the parties at the pre-hearing conference conducted on February 27, 2008, and contained in a pre-hearing order filed February 29, 2008, are hereby accepted as fact.

2. Claimant has met his burden of proving by a preponderance of the evidence that he is entitled to additional medical treatment for his compensable back injury from Dr. Routsong.

3. Claimant has met his burden of proving by a preponderance of the evidence that he is entitled to temporary total disability benefits beginning January 12, 2008 through May 7, 2008.

4. Respondent is not entitled to a credit for overpayment of temporary total disability benefits beginning June 6, 2007 and continuing through July 31, 2007.

5. Respondent has controverted claimant's entitlement to all unpaid indemnity benefits as well as the requested period of credit for overpayment.

FACTUAL BACKGROUND

_____The claimant has been employed as an air traffic controller for more than 30 years and has worked for the respondent as an air traffic controller since June 1, 2006. On

December 13, 2006 the claimant was responsible for opening the respondent's control tower in the early morning while it was still dark outside. Claimant testified that the lights were off in the tower and the only light switch was at the top of the stairs. As claimant was climbing up the darkened stairs he stepped on a vacuum cleaner that had been left out and fell. As a result of this incident the claimant suffered an admittedly compensable injury to his left shoulder, left knee, and his low back.

After some initial treatment at the emergency room, claimant came under the care of Dr. Dougherty. Dr. Dougherty performed an arthroscopic surgical procedure to repair a tear in claimant's left shoulder on January 24, 2007. In addition, he performed surgery on claimant's left knee to repair a torn medial meniscus on March 8, 2007. Claimant subsequently underwent a second surgical procedure to his shoulder on May 8, 2008.

With respect to claimant's low back injury, he has primarily been treated by Dr. Routsong and his nurse practitioner, Angela Stewart. Claimant has been treated conservatively with medication and physical therapy. Dr. Routsong has not recommended any surgical treatment. However, Dr. Routsong has recommended additional medical treatment in the form of an evaluation by Total Spine which was refused by the respondent. In addition, Dr. Routsong also referred claimant to Dr. Ennis for an evaluation which was also refused by the respondent.

Claimant has filed this claim contending that he is entitled to additional medical treatment from Dr. Routsong for his compensable low back injury. In addition, he seeks payment of temporary total disability benefits beginning January 12, 2008 and continuing through May 7, 2008. Respondent has requested a credit for overpayment of temporary total disability benefits beginning June 6, 2007 and continuing through July 31, 2007.

ADJUDICATION

_____The initial issue for consideration involves claimant's contention that he is entitled

to additional medical treatment for his compensable low back injury from Dr. Routsong. Claimant has the burden of proving by a preponderance of the evidence that he is entitled to additional medical treatment for his compensable injury. *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 for his compensable back injury from Dr. Routsong.

Initially, it should be noted the claimant has a history of prior low back complaints. Claimant testified that he sought chiropractic treatment for his low back in the late 1990s. In addition, claimant sought medical treatment for complaints of low back pain which radiated into his hip in November 2005. Based upon testing a posterior lumbar fusion at the L5-S1 level was recommended by Dr. Mangles on December 20, 2005. Claimant did not undergo the recommended surgery and apparently did not seek any additional medical treatment for his low back until after the injury on December 13, 2006, more than one year later. Claimant testified that the pain in his low back subsided and as a result he did not undergo surgery.

In support of its contention that claimant is not entitled to additional medical treatment, respondent relies upon the report of Dr. Fielding, a physician at Spine Specialists of Tulsa. Respondent sent claimant to Dr. Fielding for an evaluation. Dr. Fielding in a report dated June 22, 2007 indicates that claimant is neurologically normal. He indicates that there is no evidence of structural injury to claimant's lumbar spine as a result of the injury on December 13, 2006 and he recommends no specific treatment for claimant's back. As a result, respondent contends that claimant's currently back problems are merely a continuation of his prior back problems with no new objective findings present. However, the respondent has stipulated that claimant suffered a compensable injury to his

low back as a result of the injury which occurred on December 13, 2006. In addition, an injured worker is not required to establish a need for ongoing medical treatment with objective medical findings. *Williams v. Prostaff Temporaries*, 336 Ark. 510, 988 S.W. 2d 1 (1999).

It does not appear from a review of Dr. Routsong's medical records that he relates the claimant's low back complaints to claimant's prior problems at the L5-S1 level. Instead, a review of Dr. Routsong's medical reports indicates that claimant's current complaints involve a dysfunction at the right sacroiliac joint. As early as April 2, 2007, Dr. Routsong noted that the claimant's neurological examination was normal. However, he also noted that the claimant had a major complex lumbosacral somatic dysfunction with marked abnormalities of pelvic mechanics. Dr. Routsong indicated that surgery would not help claimant's condition. Instead, he recommended that claimant be evaluated by Total Spine for his lumbosacral somatic dysfunction problem. In a report dated May 14, 2007, Dr. Routsong noted that the evaluation at Total Spine had not been approved by the respondent and claimant was undergoing private physical therapy. He also noted that claimant was continuing to have significant lumbosacral problems particularly at the sacroiliac joints which were mechanical in nature.

Claimant returned to Dr. Routsong's office and was evaluated by Angela Stewart on July 17, 2007. Stewart indicated that claimant's problem was most likely due to the sacroiliac joint not rotating correctly. She requested an MRI scan of the lumbar spine and again referred claimant to Total Spine for a lumbosacral stabilization. This additional treatment was not approved and claimant returned to Dr. Routsong on November 26, 2007, at which time he noted that claimant's back pain had increased following his return to work. Dr. Routsong indicated that claimant had not reached maximum medical improvement because his condition continued to deteriorate and he referred claimant to Dr. Ennis for an evaluation. Respondent has not accepted liability for that evaluation.

I find 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 low back injury. As previously noted, respondent has stipulated that claimant suffered a compensable injury to his low back as a result of the fall on December 13, 2006. Even though claimant had prior complaints of low back pain, he nevertheless suffered a compensable injury to his low back on that date and respondent is liable for payment of all reasonable and necessary medical treatment provided in connection with that injury. A review of the medical records indicates that claimant's primary treating physician for his low back complaints has been Dr. Routsong and Angela Stewart, his nurse practitioner. Those medical providers indicate that claimant has a somatic dysfunction at his right sacroiliac joint which requires additional evaluation and treatment. I find that the opinions of Dr. Routsong and his nurse practitioner are credible and entitled to great weight. While Dr. Fielding has not recommended additional medical treatment, Dr. Fielding evaluated the claimant on only one occasion while Dr. Routsong and Stewart have evaluated the claimant on numerous occasions. Based upon the foregoing evidence, I find that claimant is entitled to additional medical treatment for his compensable low back injury from Dr. Routsong.

Claimant also contends that he is entitled to additional temporary total disability benefits beginning January 12, 2008 and continuing through May 7, 2008. As previously noted, respondent began paying claimant temporary total disability benefits as of May 8, 2008. In order to be entitled to temporary total disability benefits claimant has the burden of proving by a preponderance of the evidence that he remained within his healing period and that he suffered a total 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 has met his burden of proving by a preponderance

of the evidence that he is entitled to additional temporary total disability benefits from January 12, 2008 through May 7, 2008. After the surgical procedures on his shoulder and left knee the claimant returned to work for the respondent on or about August 1, 2007. Claimant testified that in December 2007 he was having a significant amount of pain in his low back. Claimant could not take his pain medication and work because air traffic controllers are prohibited from taking narcotic pain medication while working. As a result, claimant took vacation time in order to take his pain medication. Claimant testified that he last worked for the respondent on December 31, 2007, and his vacation time ended on January 12, 2008. As a result, claimant requests temporary total disability benefits beginning on that date and continuing through May 7, 2008.

As previously noted, claimant returned to Dr. Routsong for complaints of low back pain on November 26, 2007. In his report of that date Dr. Routsong indicated that claimant had not reached maximum medical improvement due to the deterioration of his condition. He also referred claimant to Dr. Ennis for an evaluation. On December 27, 2007, Dr. Routsong wrote a letter indicating that he was treating claimant for chronic pain. He also indicated that due to claimant's condition he was unable to take prescribed medication and continued to work at his present occupation. He noted that claimant was unable to climb stairs and that the narcotic pain medication could alter claimant's abilities to perform certain tasks and drive. Indeed, claimant testified that the pain medication made him incoherent and unable to think clearly.

Based upon the foregoing evidence, I find that claimant is entitled to temporary total disability benefits beginning January 12, 2008 and continuing through May 7, 2008. According to the opinion of Dr. Routsong, claimant remained within his healing period for his low back injury. In addition, Dr. Routsong was of the opinion that claimant could not take his medication and continue to work at his job due to the effects the narcotic medication had on his ability to perform certain tasks and drive. In fact, claimant testified

that he was prohibited by the respondent and the FAA from performing his job as an air traffic controller while taking pain medication. Indeed, claimant was informed by respondent that he was medically disqualified from working because he could not perform the job of an air traffic controller while taking medication. Accordingly, I find that claimant has met his burden of proving by a preponderance of the evidence that he remained within his healing period and that he suffered a total incapacity to earn wages from January 12, 2008 through May 7, 2008.

The last issue for consideration involves respondent's contention that it is entitled to a credit for overpayment of temporary total disability benefits beginning June 6, 2007 and continuing through July 31, 2007, the day before claimant returned to work for the respondent. In support of its contention, respondent relies upon a report written by Dr. Dougherty dated June 6, 2007. In his report of that date, Dr. Dougherty indicates at one point that claimant has reached maximum medical improvement with respect to his knee and shoulder. However, Dr. Dougherty also indicates that claimant will not reach maximum medical improvement until six months after the respective surgeries to the knee and shoulder. Specifically, Dr. Dougherty stated:

Patient at MMI from knee and shoulder surgery. Shoulder would benefit from additional procedure for adhesive capsulitis that has developed post operatively. Weakness in leg appears to be related to back and not to knee surgery. Recommendations are for patient to see Orthopaedic Spine Surgeon for evaluation of back second opinion as weakness in leg has affected patients outcome as well. Patient will reach MMI on knee six months after surgery. Shoulder MMI will be reached six months from that surgery. Rating can be made based on this point in time based on exam done today if requested. (Emphasis added.)

Dr. Dougherty subsequently assigned impairment ratings to the claimant's shoulder and left knee on July 5, 2007.

Obviously, Dr. Dougherty's medical report is confusing since he at one point

indicates that claimant has reached maximum medical improvement but on the other hand he also indicates that claimant will not reach maximum medical improvement until six months after the respective surgeries. The surgery on claimant's left shoulder occurred on June 24, 2007. Six months after that surgery would result in maximum medical improvement as of July 24, 2007. Claimant's left knee surgery did not occur until March 8, 2007, and six months later would put the date at September 8, 2007.

Although Dr. Dougherty did indicate that claimant had reached maximum medical improvement, he subsequently was more specific with respect to maximum medical improvement by stating that claimant would reach that point six months after each respective surgery. I find from reading Dr. Dougherty's medical report in its entirety that claimant had not reached maximum medical improvement as of June 6, 2007. Instead, I find that claimant did not reach maximum medical improvement on his shoulder and knee until six months after those respective surgeries. Thus, as of June 6, 2007 claimant remained within his healing period for both the shoulder and knee. Even though claimant may have reached the end of his healing period with respect to the shoulder as of June 24, 2007, claimant remained within his healing period for the knee surgery until September 8, 2007, six months after the surgery. By that time claimant had already returned to work for the respondent as an air traffic controller.

In summary, I find that for the period of June 6, 2007 through July 31, 2007, claimant remained within his healing period with respect to his knee injury, an unscheduled injury, and claimant had not yet returned to work; therefore, claimant was entitled to temporary total disability benefits and respondent is not entitled to a credit for overpayment during this period of time. Having requested a credit against future benefits, respondent has controverted claimant's entitlement to benefits beginning June 6, 2007 through July 31, 2007.

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 low back injury. Claimant is also entitled to temporary total disability benefits beginning January 12, 2008 through May 7, 2008. Finally, respondent is not entitled to a credit for overpayment of temporary total disability benefits. Respondent has controverted claimant's entitlement to all unpaid indemnity benefits and also for the period of requested overpayment.

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.

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.

The respondents are ordered to pay the court reporter's charges for preparing the hearing transcript in the amount of \$439.00.

IT IS SO ORDERED.

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE