

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F607419

RICKIE CUMMINGS, EMPLOYEE	CLAIMANT
FLASH MARKETS, INC., EMPLOYER	RESPONDENT
AIG CLAIMS SERVICE, INC., INSURANCE CARRIER/TPA	RESPONDENT #1
SECOND INJURY FUND	RESPONDENT #2

OPINION FILED FEBRUARY 14, 2008

Hearing before Chief Administrative Law Judge David Greenbaum on January 17, 2008, at Forrest City, St. Francis County, Arkansas.

Claimant represented by Mr. Marc I. Baretz, Attorney-at-Law, West Memphis, Arkansas.

Respondents #1 represented by Mr. Jarrod S. Parrish, Attorney-at-Law, Little Rock, Arkansas.

Respondent #2 waived appearance.

STATEMENT OF THE CASE

A hearing was conducted January 17, 2008, to determine whether the claimant is entitled to additional workers' compensation benefits.

A prehearing conference was conducted in this claim on December 19, 2007, and a Prehearing Order was filed on said date. At the hearing, the parties stated that the stipulations, issues, as well as their respective contentions were properly set out in the Prehearing Order, subject to respondent #1 withdrawing one of its allegations as set out further below. A copy of the Prehearing Order was introduced, without objection, as "Commission's Exhibit 1."

It was stipulated that the employment relationship existed between the claimant and respondents #1 at all relevant times, including June 22, 2006. It was further stipulated that the claimant sustained a compensable injury arising out of and during the course of his employment with Flash Markets, Inc., on said date, at which time his average weekly wage was sufficient to entitle him to compensation rates of \$138.00 per week for both temporary total and permanent partial disability. Finally, it was agreed that respondents #1 paid temporary total disability, as well as related medical expenses through June 21, 2007, at which time it controverted claimant's entitlement to all additional benefits.

By agreement of the parties, the following issues were presented for determination:

- 1) Whether the claimant's healing period had ended.
- 2) Claimant's entitlement to additional temporary total disability.
- 3) Claimant's entitlement to additional medical treatment, including surgery.

Claimant contended, in summary, that he was entitled to additional temporary total disability beginning June 22, 2007, and continuing through the present, maintaining that his healing period had never ended; that respondents prematurely terminated medical treatment and were responsible for all outstanding medical treatment, together with continued reasonably necessary medical treatment, including, but not limited to surgery that had been recommended; and that a controverted attorney's fee should attach to all additional benefits awarded. The

claimant reserved the issue of permanent disability.

Respondents #1 contended that all appropriate benefits had been paid while maintaining that the primary cause of claimant's need for treatment was pre-existing back injuries and his degenerative condition. At the prehearing conference, respondents maintained that the objective findings at L3-4 did not show up until March 14, 2007, almost nine (9) months post-injury and that earlier diagnostic studies performed on June 23, 2006, did not reveal any abnormalities at the L3-4 level. However, at the hearing, respondents #1 withdrew this contention, acknowledging that an earlier MRI reflected findings at L3-4, making its previous contentions inaccurate. Alternatively, respondents #1 asserted that some or all of claimant's need for surgery was attributable to a non-work related, intervening cause.

Respondent #2 reserved the right to state its contentions once permanent disability was ripe for determination and did not participate at the immediate hearing.

Although respondents #1 identified numerous witnesses, the claimant was the only lay witness to testify. The record is composed solely of the transcript of the January 17, 2008, hearing containing volumes of exhibits.

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 claimant and to observe his demeanor, the

following findings of fact and conclusions of law are made in accordance with Ark. Code Ann. §11-9-704:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. The stipulations agreed to by the parties are hereby accepted as fact.
3. The claimant's healing period had not ended at the time respondents #1 terminated benefits on June 21, 2007.
4. The claimant has proven, by a preponderance of the evidence, that he is entitled to additional temporary total disability for the period beginning June 22, 2007, and continuing through the present and until a date yet to be determined.
5. The claimant has proven, by a preponderance of the evidence, that he is entitled to additional medical treatment which is directly and causally related to his June 22, 2006, admitted injury which aggravated a pre-existing condition. Respondents are responsible for any outstanding medical treatment, together with continued, reasonably necessary medical treatment, including recommended low back surgery.
6. Respondents #1 have failed to show that the claimant's need for surgery is attributable to a non-work related, intervening cause.
7. The issue of permanent disability has been specifically reserved.

## DISCUSSION

\_\_\_\_\_The facts in this case are basically undisputed. Although the record reflects that the claimant sustained prior injuries and also had pre-existing impairments and/or disabilities, it is undisputed that the claimant sustained a compensable injury on June 22, 2006. Respondents #1 contended that the primary cause of claimant's need for treatment was the claimant's pre-existing back injuries and the claimant's degenerative condition. However, for an admitted accidental injury, it is not necessary that the claimant prove that the injury is the major cause of the disability or need for treatment. *Estridge v. Waste Management*, 343 Ark. 276, 33 S.W.3d 167 (2000).

On cross-examination, respondents #1 questioned the claimant's credibility. However, again, compensability of this claim is undisputed. Although, in the alternative, respondents #1 asserted that some or all of claimant's need for surgery was attributable to a non-work related, intervening cause, and, identified a number of potential witnesses, the claimant was the only witness to testify. Suffice it to say that the record contained no credible evidence whatsoever of an independent intervening accident. Further, the issues presented for determination turn almost entirely upon the medical evidence and not on the claimant's credibility. The medical evidence clearly supports this claim for additional benefits, as will be reflected further below.

The claimant, Rickie Cummings, is fifty-four (54) years old. The claimant

worked for the respondent, Flash Markets, Inc., for approximately two (2) months before sustaining an admitted injury on June 22, 2006. The claimant identified two (2) different work-related incidents which required medical treatment and the claimant's disability. The claimant's testimony with regard to his injury and medical treatment is set out below:

Q And what were you doing to cause you to injure yourself?

A Initially, I was in the cooler stocking the cooler, stepped out of a chair, kind of slipped, and landed on my rump on a chair. I think that was the initial injury. I had some pain, but I went on, and I think it was a few days, a week or so later I was stocking some tobacco products, had like a popping in my foot, you know, something that just startled me, and I started to jump up and twisted, kind of twisted my back there, and I think that's what really iced the cake. The next day I barely could get out of the bed.

Q Now, both of those occurrences you referred to happened while you were engaged in your duties at Flash Market, correct?

A Yes, sir.

Q And did you seek any medical care?

A Yes, sir, I did. I had gone to work – I got up and went to work, and sitting there at work I was hurting so bad that – it was before Sam came in, and I told Linda, which is the deli manager, that I was hurting so bad that I had to go back home. I just, you know, wasn't able to – I was hurting real bad and I went to the emergency room.

Q Okay. Was that when you went to the emergency room on June 23, '06, at Crittenden Memorial Hospital?

A Yes, sir.

Q And at that time, did you return to work any after that date?

A No, sir.

Q You haven't returned to work since that date –

A No, sir.

Q – due to the current problem?

A No, sir.

Q Now, did workmen's comp accept your claim as being related to your injury initially?

A As far as I know, they did.

Q And did you follow up with care with any other doctors?

A Yes, sir, I've seen Dr. Olinger. I seen –

Q Prior to seeing Dr. Olinger, did you see Dr. Pierce?

A Yes, sir, I've seen Dr. Pierce, too. (Tr.15-16)

As reflected by the stipulations, respondents exercised good faith in meeting its obligations under our workers' compensation laws by providing the claimant with prompt, reasonably necessary medical treatment, as well as payment of temporary total disability. In fact, respondents paid medical and related treatment for almost one full year, at which time it controverted claimant's entitlement to further benefits. It appears that respondents controverted additional benefits, including surgery, based upon a opinions from Dr. Olinger and Dr. Braden that the major cause of the claimant's need for surgery was a prior failed back syndrome and that only a portion of the claimant's condition was related to the work-related injury. As previously pointed out, major cause is not a necessary element for a claim for medical treatment and temporary total disability. While it may be a factor in any claim for

permanent disability, that issue has been specifically reserved.

The claimant was initially examined and treated in the emergency room at the Crittenden Memorial Hospital. The claimant was next examined by his family physician, Dr. Trent Pierce. Dr. Pierce referred the claimant to Dr. Rodney G. Olinger, a neurosurgeon with the Semmes-Murphy Clinic in Memphis, Tennessee. The claimant has undergone extensive examinations and diagnostic studies. All of the claimant's medical treatment has been by referral of an authorized treating physician.

Again, the claimant was first seen in the emergency room on June 23, 2006, at which time diagnostic studies revealed various abnormalities at the same level of claimant's prior surgeries. The claimant was seen in follow-up by his family physician, Dr. Pierce, on June 30, 2006. Dr. Pierce noted a history of two (2) separate work-related events. Dr. Pierce noted that the claimant complained of pain in his back with significant pain into both legs, worse on the left than the right, as well as numbness involving the left leg. The claimant reported that it felt as though both feet were on fire. Dr. Pierce noted that a CT scan showed a ruptured disc at L4-5. Dr. Pierce referred the claimant to Dr. Olinger, noting that Dr. Olinger was agreed to by the respondent, but that the first available date to see Dr. Olinger was July 12, 2006. The claimant was taken off work until being evaluated by Dr. Olinger. Dr. Olinger evaluated the claimant on July 12, 2006, at which time he recommended a MRI scan while placing the claimant on various medications. (Cl. Ex. A, p.22)

Respondents retained a nurse case manager who sent Dr. Olinger a letter requesting that he address a number of issues related to the claimant's condition. Dr. Olinger clearly indicated that there were acute objective findings and, further, that the claimant's symptoms and diagnosis were related to the injury. Although Dr. Olinger acknowledged that part of the claimant's problems were related to a prior failed back syndrome, Dr. Olinger consistently opined that the injury aggravated the pre-existing condition and that the claimant needed a MRI before commenting further, pointing out that the CT was inadequate to answer all the questions. Dr. Olinger opined that the claimant had not reached MMI on August 22, 2006, without benefit of the MRI. (Cl. Ex. A, pp.29-30)

The claimant subsequently underwent a MRI on September 15, 2006, which revealed herniated discs at both L3-4 and L4-5. As previously pointed out at the prehearing conference, respondents maintained that the findings at L3-4 did not show up until March 14, 2007, which was clearly inaccurate and which respondents later acknowledged was incorrect. The record reflects that the disc herniation at this new level was revealed as soon as the diagnostic study was performed. (Cl. Ex. A, pp.34-35)

Based upon the aforementioned diagnostic study, Dr. Olinger recommended additional diagnostic studies, as well as surgery, including a lumbar fusion, and recommended that the claimant be referred to an orthopedic surgeon for the recommended surgery. (Cl. Ex. A, pp.37, 42)

The claimant was next referred to Dr. Glenn Crosby. Dr. Crosby evaluated the claimant on January 24, 2007, and recommended a diskectomy and interbody fusion with instrumentation. Dr. Crosby noted that he did not perform those types of procedures and suggested that the workers' compensation physicians make the appropriate referral. (Cl. Ex. A, p.44)

The claimant underwent additional diagnostic studies. Suffice it to say that a preponderance of the credible medical opinion of record recommended that the claimant undergo surgery. The claimant has requested the recommended surgery. Respondents eventually had the claimant undergo an examination and evaluation by Dr. Terrence P. Braden, D. O. Dr. Braden performed his evaluation on June 13, 2007. Dr. Braden, likewise, confirmed that there were acute objective findings that were related to the admitted work-related injury. Dr. Braden attributed thirty percent (30%) of the claimant's condition to the acute work injury and seventy percent (70%) to the pre-existing condition. Apparently, based upon Dr. Braden's conclusion that the greater percentage of the claimant's difficulties arose from pre-existing conditions, respondents controverted claimant's entitlement to additional benefits. (Cl. Ex. A, pp.70-74)

Respondents' contention that all appropriate benefits have been paid, maintaining that the primary cause of claimant's need for treatment and disability was the pre-existing back injuries and claimant's degenerative condition is based on a flawed interpretation of the Arkansas law. For a specific accidental injury, it is

not necessary that the claimant prove that the injury is the major cause of the disability or need for treatment. Major cause only applies to cumulative trauma injuries and to permanent disability. The claimant's injury was the result of specific incidents. Permanent disability has been specifically reserved.

A pre-existing disease or infirmity does not disqualify a claim if the employment aggravated, accelerated, or combined with the disease or infirmity to produce a disability for which compensation is sought. *Nashville Livestock Commission v. Cox*, 302 Ark. 69, 787 S.W.2d 660 (1990); *Minor v. Poinsette Lumber & Manufacturing Co.*, 235 Ark. 195, 357 S.W.2d 504 (1962); *St. Vincent Medical Center v. Brown*, 53 Ark. App. 30, 917 S.W.2d 550 (1996).

Respondents were not justified in terminating the claimant's temporary total disability on June 21, 2007. The claimant has proven, by a preponderance of the credible evidence, that he remains within his healing period and is entitled to additional temporary total disability. The claimant has also proven, by a preponderance of the credible evidence, that respondents remain responsible for continued medical treatment, including, but not limited to recommended surgery.

Alternatively, respondents assert that some or all of the claimant's need for surgery is attributable to a non-work related, intervening cause. This is an affirmative defense. Respondents offered no credible evidence whatsoever to support its alternative contentions. Accordingly, I hereby make the following:

AWARD

\_\_\_\_\_ Respondent, AIG Claims Service, Inc., is hereby directed and ordered to pay, to the claimant, temporary total disability benefits at the rate of \$138.00 per week beginning June 22, 2007, and continuing through the present and until such time as claimant's healing period can be determined.

All accrued benefits shall be paid in lump sum and without discount.

Respondents are further directed and ordered to pay all outstanding medical treatment, together with continued reasonably necessary medical treatment, including, but not limited to recommended surgery.

Additionally, claimant's attorney, Mr. Marc I. Baretz, is hereby awarded the maximum statutory attorney's fee on this entire Award pursuant to and limited by Ark. Code Ann. §11-9-715.

This Award shall bear interest at the legal rate until paid.

IT IS SO ORDERED.

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DAVID GREENBAUM  
Chief Administrative Law Judge