

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**CLAIM NUMBER F610487**

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| CHARLES L. JOHNSON, EMPLOYEE  | CLAIMANT   |
| ABILITIES UNLIMITED, INC., EMPLOYER   | RESPONDENT |
| COMMERCE & INDUSTRY INSURANCE COMPANY c/o<br>AIG DOMESTIC CLAIMS, INC., CARRIER/TPA | RESPONDENT |

**OPINION FILED AUGUST 6, 2008**

Hearing conducted before ADMINISTRATIVE LAW JUDGE MARK CHURCHWELL, in Texarkana, Miller County, Arkansas.

The claimant was represented by HONORABLE GREGORY R. GILES, Attorney at Law, Texarkana, Arkansas.

The respondents were represented by HONORABLE JARROD S. PARRISH, Attorney at Law, Little Rock, Arkansas.

**STATEMENT OF THE CASE**

A hearing was held in the above-styled claim on June 5, 2008, in Texarkana, Arkansas. A Prehearing Order was entered in this case on March 26, 2008.

The following stipulations were submitted by the parties either in the Prehearing Order or at the start of the hearing and are hereby accepted:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The employer/employee/carrier relationship existed at all relevant times.
3. The claimant sustained a compensable injury to his lower back on September 11, 2006.

4. Pursuant to a change of physician order entered July 18, 2007, the claimant's primary treating physician is now Dr. Shailesh Vora.
5. The claimant earned \$7.25 per hour at the time of his injury.

By agreement of the parties, the issues to be litigated and resolved at the present time were limited to the following:

Claimant:

1. The claimant's entitlement to temporary total disability benefits from December 5, 2006, to a date yet to be determined.
2. Whether the respondents should be ordered to pay for the additional medical treatment being recommended by Dr. Vora.
3. Attorney's fees.
4. Appropriate compensation rates and possible underpayment.

Respondents:

1. According to the claimant's counsel, he is seeking additional medical and temporary disability benefits.

2. Applicability of Arkansas Code Annotated § 11-9-526.

The record consists of the June 5, 2008, hearing transcript and the exhibits contained therein.

### DISCUSSION

#### **1. Evidentiary Objection.**

Dr. Steven Cathey evaluated the claimant on January 18, 2007, and both parties included a copy of Dr. Cathey's clinic note in their exhibits. Dr. Cathey was not called as a witness to testify by either party at the hearing held on June 5, 2008. The claimant took issue at the hearing with some statements in Dr. Cathey's report, and the claimant's attorney proffered testimony from the claimant regarding statements which Dr. Cathey allegedly made to the claimant during the examination that are inconsistent with Dr. Cathey's written report dated January 18, 2007. (T. 39-41) The respondents' attorney objected on the grounds that the claimant is not permitted to put on hearsay testimony attacking the credibility of Dr. Cathey without deposing Dr. Cathey or permitting Dr. Cathey an opportunity to respond. (T. 41)

The respondents' objection is overruled for two reasons. First, the Commission is not bound by the

technical rules of evidence, and may instead determine the weight to accord hearsay testimony that might be inadmissible in a court of law. St. Paul Ins. Co. v. Touzin, 267 Ark. 539, 592 S.W.2d 447 (1980). Second, even the technical rules of evidence recognize the right of a party to attack the credibility of a hearsay declarant, Dr. Cathey in this instance. The right to attack the credibility of a hearsay declarant is not contingent on affording the declarant an opportunity to deny or explain as the respondents' attorney agreed. See Arkansas Rule of Evidence 806. I have therefore weighed the claimant's proffered testimony, along with all other evidence in the record, in rendering a decision in this case.

**2. Whether The Respondents Should Be Ordered To Pay For The Additional Medical Treatment Being Recommended By Dr. Vora.**

Employers must promptly provide medical services which are reasonably necessary for treatment of compensable injuries. Ark. Code Ann. § 11-9-508(a). Injured employees have the burden of proving by a preponderance of the evidence that medical treatment is reasonably necessary for treatment of the compensable injury. Ark. Code Ann. § 11-9-705(a)(3); Jordan v. Tyson Foods, Inc., 51 Ark. App. 100, 911 S.W.2d 593 (1995). What constitutes reasonably

necessary medical treatment is a question of fact for the Commission. Gansky v. Hi-Tech Engineering, 325 Ark. 163, 924 S.W.2d 790 (1996); Air Compressor Equipment v. Sword, 69 Ark. App. 162, 11 S.W.3d 1 (2000).

In the present case, I find that the claimant has failed to establish that the additional medical treatment proposed by Dr. Vora is for a condition causally related to the compensable back injury that the claimant sustained.

In this regard, the record establishes that the claimant sustained a compensable low back injury in a motor vehicle accident on September 11, 2006. The respondents provided the claimant medical treatment through Dr. Rodney Griffin and through Quantum Rehabilitation and Physical Therapy in 2006.

The claimant also engaged the services of a chiropractor, Rob Butler, in 2006. Mr. Butler ordered an MRI of the claimant's lower back and proposed a neurosurgical evaluation. The claimant was evaluated by Dr. Steven Cathey, a neurosurgeon selected by the respondents, on January 18, 2007. Dr. Cathey diagnosed a musculoskeletal injury. When the claimant was not satisfied with Dr. Cathey's conclusion, he requested and received a Commission-ordered change of physician to Dr. Shailesh Vora. Dr. Vora

first saw the claimant in September of 2007. Dr. Vora ordered a second MRI, put the claimant in off work status, and proposed additional medical treatment.

Dr. Vora testified that his clinical findings are indicative of a left S-1 radiculopathy with pressure on the left S-1 nerve root. (C. Exh. 2 p. 5) Dr. Vora testified that if the claimant has had muscle spasms since the injury at work, the findings that Dr. Vora observed on the second MRI, conducted on November 26, 2007, are consistent with an injury or problem that would cause muscle spasm and numbness to the leg because of a pinched nerve. Dr. Vora testified that the annulus was ruptured, indicating a disk herniation at L5-S1 on the 2007 MRI that he performed. (C. Exh. 2 p. 22)

After reviewing Dr. Vora's deposition testimony, Dr. Cathey indicated in an April 12, 2008, letter that he had not seen any structural abnormality on the 2006 MRI that could be related to the motor vehicle accident of September 11, 2006. Dr. Cathey apparently did not review the 2007 MRI, and indicated that he would defer to Dr. Vora if the 2007 MRI indicated a new injury as compared to the initial study. However, based on the evaluation in January of 2007,

Dr. Cathey did not see any indication for any additional treatment or testing. (R. Exh. 1 p. 10)

I find that Dr. Vora's testimony establishes by a preponderance of the evidence that Dr. Vora detected a herniated disk with left S-1 nerve root compression in the MRI performed on November 26, 2007. However, based on the results of Dr. Cathey's evaluation in January of 2007, which I also find credible, I find that the claimant sustained only a musculoskeletal injury in the motor vehicle accident at work in 2006. I therefore find that the claimant has failed to establish by a preponderance of the evidence that the disk abnormality and the nerve root impingement diagnosed by Dr. Vora are causally related in any way to the claimant's musculoskeletal low back injury sustained on September 11, 2006.

In this regard, I note that the claimant underwent his first post-injury lumbar MRI on November 30, 2006, and that first MRI was reviewed and discussed by Dr. Cathey in his January 18, 2007, clinic note. Dr. Cathey's clinic note indicates that he reviewed the MRI with the claimant and that the MRI showed no signs of disk herniation or nerve root compression. Dr. Cathey's examination in January, unlike Dr. Vora's examination eight month's later in

September, also indicated no sign of lumber radiculopathy, or other neurological abnormality. (C. Exh. 1 p. 43) Dr. Cathey concluded that the claimant sustained a musculoskeletal strain in the accident. (C. Exh. 1 p. 44)

Notably, Dr. Vora testified that he does not have a record of actually seeing the MRI film from 2006. (C. Exh. 1 p. 5) Dr. Vora, prior to his 2008 deposition, was also not aware that the claimant had undergone a neurosurgical evaluation by Dr. Cathey in January of 2007. (C. Exh. 1. p. 23)

In comparing Dr. Cathey's conclusions with Dr. Vora's conclusions, I find that Dr. Vora detected a new abnormality (disk herniation causing nerve root compression) on the 2007 MRI which was not present on the 2006 MRI. To the extent that Dr. Vora relates the claimant's 2007 symptoms to the 2006 injury, I note that he did so based on a history provided to him by the claimant, and not based on any actual comparison of the 2006 and 2007 MRI films. (C. Exh. 2 p. 16).

For his part, the claimant disputes the findings stated in Dr. Cathey's January 2007 clinic note. The claimant also disputes the findings on a physical therapy report indicating that he had reached his pain goals on October 13,

2006. Coincidentally, the claimant's hearing testimony also greatly contradicts the testimony of Ms. Sandy Marler, his supervisor, regarding his application for employment at Tyson after he got hurt at Abilities Unlimited and regarding their conversations on his last day at work.

After observing the witnesses at the hearing and reviewing the entire record, I am not persuaded by the claimant's testimony, by Dr. Vora's testimony, or by any other aspect of the record that Dr. Cathey mis-read the claimant's 2006 MRI or mis-reported the claimant's lack of neurological symptoms in January of 2007. I find that the preponderance of the credible evidence establishes that the claimant sustained a musculoskeletal injury at work in 2006. Again, under these circumstances, I conclude that the new abnormalities detected by Dr. Vora on the 2007 MRI are not causally related to the claimant's 2006 injury at work. I therefore find that the additional treatment proposed by Dr. Vora in 2007 is also not causally related to the claimant's compensable musculoskeletal injury.

**3. Additional Temporary Disability Compensation After December 5, 2006.**

Temporary total disability for unscheduled injuries is that period within the healing period in which a claimant

suffers a total incapacity to earn wages. Ark. State Highway & Transportation 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).

In addition, Arkansas Code Annotated Section 11-9-526 provides:

If any injured employee refuses employment suitable to his or her capacity offered to or procured for him or her, he or she shall not be entitled to any compensation during the continuance of the refusal, unless in the opinion of the Workers' Compensation Commission, the refusal is justifiable.

In the present case, the records which Ms. Beth Kinley created document the claimant's periods of off-work, light-duty work, and full-duty work between September 11, 2006, and December 11, 2006. Ms. Kinley's records document that the claimant worked on unrestricted duty in the warehouse from November 8, 2006, through December 4, 2006. The claimant called to report that his back was hurting on December 5, 2006, and returned to work on December 11, 2006, with a light duty restriction. (R. Exh. 1 p. 8) The claimant repeatedly testified at the hearing that when he

returned to work with light duty limitations in December of 2006, Sandy Marler did not offer to return him to work on light duty and sent him home. (T. 31, 32, 46, 70, 78, 79, 80, 88, 90, 154, 155, 157, 163)

However, I instead find credible in its entirety the hearing testimony of Sandy Marler, the Executive Director of Abilities Unlimited Sheltered Workshop in Magnolia, where the claimant was employed. Ms. Marler testified that she attempted to assign the claimant to the paper baler in the warehouse on the last day that he returned to work. Ms. Marler testified that the claimant refused to work on the paper baler. (T. 129)

I also find that the job on the baler proposed by Ms. Marler was within the claimant's 10 pound lifting restriction that he brought in that day. I therefore find that the offered job was within the claimant's physical capacity. In this regard, Ms. Marler credibly testified that she would assign other workers to load the baler and that the claimant's function would be to close the baler door and push a button. (T. 126) The work would therefore not violate the claimant's 10 pound light-duty lifting restriction.

I also find that the claimant's refusal to work on the paper baler with assistance was unjustified. Ms. Marler credibly testified that the claimant refused to operate the paper baler and requested that he be assigned instead to the cardboard baler. (T. 129) Ms. Marler credibly testified that there is no difference in the operation of the two balers. (T. 127) However, the cardboard baler is operated solely by a particular Abilities Unlimited client. (T. 128)

I also find that the claimant's unjustifiable refusal to operate the paper baler bars his claim for additional temporary disability compensation in its entirety. In this regard, I find credible Dr. Cathey's conclusion that the claimant reached maximum medical improvement for his work-related musculoskeletal injury by January 18, 2007. (R. Exh. 1 p. 9) I also find credible Ms. Marler's June 5, 2008, testimony that, barring any unforeseen event, the claimant could still be working on the paper baler with helpers if he had accepted that position. (T. 134)

#### **4. Average Weekly Wage.**

Arkansas Code Annotated Section 11-9-518 provides:

(a) (1) Compensation shall be computed on the average weekly wage earned by the employee under the contract of hire in force at the time of the accident and in no case shall be computed on less than a full-time workweek in the employment.

(2) Where the injured employee was working on a piece basis, the average weekly wage shall be determined by dividing the earnings of the employee by the number of hours required to earn the wages during the period not to exceed fifty-two (52) weeks preceding the week in which the accident occurred and by multiplying this hourly wage by the number of hours in a full-time workweek in the employment.

(b) Overtime earnings are to be added to the regular weekly wages and shall be computed by dividing the overtime earnings by the number of weeks worked by the employee in the same employment under the contract of hire in force at the time of the accident, not to exceed a period of fifty-two (52) weeks preceding the accident.

(c) If, because of exceptional circumstances, the average weekly wage cannot be fairly and justly determined by the above formulas, the commission may determine the average weekly wage by a method that is just and fair to all parties concerned.

Where the contract of hire provides for part-time employment, an injured worker's average weekly wages should be computed on the basis of a normal part-time week plus any overtime actually worked. Ryan v. NAPA, 266 Ark. 802, 586 S.W.2d 6 (1979). In order to receive benefits based on a 40 hour week, a claimant must either actually have worked at least 40 hours per week or be bound by contract to work 40 hours if the work is made available. Metro Temporaries v. Boyd, 314 Ark. 479, 863 S.W.2d 316 (1993). The claimant has the burden of proving that he was bound by contract to work forty hours each week if the work was made available. A & C

Servs., Inc. v. Sowell, 44 Ark. App. 150, 870 S.W.2d 764 (1994).

The Arkansas Court of Appeals has concluded that the Commission did not err in basing a claimant's wage rate for seasonal work on a full forty hour work week under circumstances where the claimant's contract of hire was for forty hours per week or more whenever the work was available, and the claimant worked less than forty hours per week when her working hours were reduced because of the weather. Chapel Gardens Nursery v. Lovelady, 47 Ark. App. 114, 885 S.W.2d 915 (1994). Likewise the Arkansas Court of Appeals has affirmed a Commission finding that a claimant should not be penalized for missing work for legitimate leave time including personal health reasons and for company convenience when work was not available. Rheem Manufacturing Mfg., Inc. v. Bark, 97 Ark. App. 224, \_\_\_ S.W.3d \_\_\_ (2006).

In the present case, there is no dispute that the claimant's wage rate at the time of his injury was \$7.25 per hour. The only issue is whether his average weekly wage should be determined based on the number of hours he actually worked before the injury, or instead based on the 37½ hours per week which he worked some but not all weeks.

The claimant testified that he worked 40 hours per week but did not get paid for his half-hour lunch each day. The claimant testified that when he missed work, usually it would be for things like going to the dentist or driving his wife to doctor appointments. (T. 12) However, I note from the attendance records prepared by Ms. Kinley for the period after the claimant's injury, he had several days where he did not call and did not show up for work. He had several other days where he showed up late. (R. Exh. 2. p. 1). I also note from those same attendance records that the claimant had available sick leave and annual leave which was paid in lump sum upon his request in December of 2006.

Under these circumstances, I am not persuaded that the claimant was expected to work 37½ hours when the work was made available. I am instead persuaded that the claimant had discretion to work less than 37½ hours without pay and did so. I am not persuaded in any way that the claimant worked less than 37½ hours per week for the convenience of his employer, and the claimant has not presented any evidence of a dentist's visit or a doctor's visit for his wife to substantiate his testimony that these were the types of reasons that he missed work before his accident. The claimant has therefore failed to persuade me that he was a

full-time employee as he contends. I find that the claimant's average weekly wage should be determined based on his actual hours worked and not based on a 37½ hour work week.

**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 at all relevant times.
3. The claimant sustained a compensable injury to his lower back on September 11, 2006.
4. Pursuant to a change of physician order entered July 18, 2007, the claimant's primary treating physician is now Dr. Shailesh Vora.
5. The claimant earned \$7.25 per hour at the time of his injury.
6. The claimant has failed to establish by a preponderance of the credible evidence that the additional treatment proposed by Dr. Vora is reasonably necessary for his work-related injury.
7. The claimant has failed to establish by a preponderance of the credible evidence that he is

entitled to any period of additional temporary disability compensation after December 5, 2006.

8. The claimant has failed to establish by a preponderance of the credible evidence that he was a full-time employee. The claimant's average weekly wage is therefore appropriately based on the number of hours he actually worked.

**ORDER**

For the reasons discussed herein, this claim must be, and hereby is, respectfully denied.

IT IS SO ORDERED.

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MARK CHURCHWELL  
Administrative Law Judge