

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NOS. F604514/F702713

RAYMOND KAUFFELD, Employee	CLAIMANT
DDP HOLDINGS, INC., Employer	RESPONDENT
TRAVELERS INSURANCE CO., Carrier	RESPONDENT CARRIER #1
WAUSAU INSURANCE COMPANY, Carrier	RESPONDENT CARRIER #2

OPINION FILED FEBRUARY 21, 2008

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

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

Respondent #1 represented by PHILLIP CUFFMAN, Attorney, Little Rock, Arkansas.

Respondent #2 represented by JAMES A. ARNOLD, II, Attorney, Fort Smith, Arkansas.

STATEMENT OF THE CASE

On January 30, 2008, the above captioned claim came on for a hearing at Springdale, Arkansas. A pre-hearing conference was conducted on August 22, 2007, and a pre-hearing order was filed on that same date. 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 claimant sustained a compensable injury to his low back on April 15, 2006 at which time Travelers was the workers' compensation carrier. Travelers paid some temporary total disability and medical benefits.
3. Wausau was the workers' compensation carrier on February 27, 2007.
4. The claimant was earning sufficient wages to entitle him to compensation at the maximum rates.

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

1. Whether claimant is entitled to additional workers' compensation benefits as a result of his April 15, 2006 compensable injury or whether he suffered a new injury on February 27, 2007.
2. Claimant's entitlement to temporary total disability benefits.
3. Claimant's entitlement to additional medical benefits.
4. Attorney fee.

At the time of the hearing the parties had agreed to stipulate that claimant is entitled to temporary total disability benefits beginning May 7, 2007 and continuing through a date yet to be determined. The parties also agreed to stipulate that claimant is entitled to additional medical treatment. The only issue remaining to be litigated is whether respondent #1 or respondent #2 is liable for payment of compensation benefits.

The claimant contends his current condition is due to the April 15, 2006 compensable injury or the February 27, 2007 compensable injury or a combination of both. Therefore, the claimant contends that A.C.A. §11-9-806 should be applied in regard to his entitlement to medical treatment and that the Commission should order the respondents to pay for treatment by or at the direction of Dr. Blankenship. Claimant contends that as a result of the April 15, 2006 compensable injury or a combination of both, he is entitled to temporary total disability benefits from when they were terminated on or about May 7, 2007 until a date yet to be determined. Claimant contends his attorney is entitled to an attorney's fee.

Respondent #1 contends that claimant suffered either an aggravation of a pre-existing condition or a new injury on or about February 27, 2007 while under the workers' compensation coverage of Wausau Insurance Company.

Respondent #2 contends that claimant did not suffer a compensable injury while it was the workers' compensation carrier.

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 August 22, 2007, and contained in a pre-hearing order filed that same date, are hereby accepted as fact.

2. The parties' stipulations that claimant is entitled to temporary total disability benefits beginning May 7, 2007 and continuing through a date yet to be determined as well as their stipulation that claimant is entitled to additional medical treatment are also hereby accepted as fact.

3. I find that claimant's need for additional medical treatment and his resulting disability are attributable to the injury which occurred on April 15, 2006; therefore, respondent #1 is liable for payment of compensation benefits.

4. Until a decision with respect to liability becomes final, the parties pursuant to A.C.A. §11-9-806 are to pay appropriate compensation benefits on an equal basis. However, so long as all workers' compensation benefits are paid to the claimant the parties will be permitted to reach an agreement as to the amount and/or percentage to be paid by each carrier.

5. Claimant's attorney is entitled to the maximum attorney fee on temporary total disability benefits beginning May 7, 2007 and continuing through a date yet to be determined.

### FACTUAL BACKGROUND

The claimant worked for the respondent company which performed set-up work for new Lowe's stores. On April 15, 2006, the claimant suffered a compensable injury to his low back while working for his employer. Respondent #1 was the workers' compensation carrier at that time and it accepted claimant's injury as compensable and paid claimant some workers' compensation benefits including medical and temporary total disability benefits.

Following the injury in April 2006 claimant received medical treatment from Vicki Moore, a nurse practitioner. Moore prescribed claimant medication, restrictions, and physical therapy. Claimant continued to receive conservative treatment and eventually underwent an MRI scan. He was also evaluated one time by Dr. Routsong, neurosurgeon, who recommended conservative treatment. In June 2006 claimant was released to return to work without restrictions by Dr. Dean, general practitioner.

Claimant testified that he returned to work for the respondent but that he continued to have problems with his back. Claimant testified that he could not walk very far, he had trouble sitting in a car, and he continued to take prescription medication. Claimant also testified that even though he was released to return to work without restrictions, there were various job activities that he could no longer perform for the respondent.

On February 27, 2007 claimant testified that his back symptoms worsened after he picked up some decking. At the time of that incident respondent #2 was the workers' compensation carrier. Respondent #2 apparently paid claimant some compensation benefits before discontinuing payment.

Subsequent to February 2007 the claimant has come under the care of Dr. Blankenship, neurosurgeon. Dr. Blankenship has recommended surgery for claimant's low back condition.

Claimant has filed this claim contending that he is entitled to additional temporary

total disability benefits and medical treatment for his low back condition. Both of the carriers agree that claimant is entitled to additional compensation benefits, but differ as to which carrier is liable.

### ADJUDICATION

A respondent is required to provide medical services that are reasonably necessary for treatment of a compensable injury. A.C.A. §11-9-508(a). What constitutes reasonably necessary medical treatment is a question of fact to be determined by the Commission. *White Consolidated Industries v. Galloway*, 74 Ark. App. 13, 45 S.W. 3d 396 (2001).

After reviewing the evidence in this case impartially, without giving the benefit of the doubt to either party, I find that respondent #1 is liable for payment of compensation benefits. My review of the evidence presented in this case indicates that claimant's need for medical treatment and his resulting disability are attributable to the April 15, 2006 injury, not an incident which occurred on February 27, 2007.

Initially, it should be noted that following the claimant's April 2006 injury he was treated conservatively by his treating physicians and was eventually released to return to work without restrictions as of June 28, 2006. However, claimant testified that he did not feel as if he had completely recovered from the April 2006 injury. Claimant testified that even after he was released he continued to have physical problems such as an inability to walk very far and sitting in a car. Claimant also testified that after he returned to work he was unable to perform some job activities such as hanging ceiling fans and performing some lifting activities. Furthermore, claimant testified that during this period of time he continued to take prescription medication in the form of muscle relaxers and pain medication.

Finally, the most significant evidence with respect to this issue is the opinion of Dr. Blankenship. Dr. Blankenship is a neurosurgeon who evaluated the claimant after

February 27, 2007. Dr. Blankenship has reviewed the claimant's MRI scan from June 2006 and also an MRI scan which was performed in February 2007. Based upon his review of the MRI scans as well as his examination and evaluation of the claimant, it was Dr. Blankenship's opinion that claimant's current problems are the result of the April 15, 2006 injury. In a letter dated April 25, 2007, Dr. Blankenship stated:

It is my opinion based on a reasonable degree of medical certainty and a total review of the gentleman's MRI and previous history that his current problem for his back and need for treatment are directly related to his injury that he incurred last year. He has had a re-exacerbation but I do feel like greater than 51% of his need for treatment is a result of his original injury last year.

Likewise, in his clinic note dated April 25, 2007 Dr. Blankenship stated:

... I think the underlying culprit is the disk herniation that is noted at L5-S1. This would be consistent with the flexion injury that he experienced last year. Since the gentleman never got over this but simply got better and has had an exacerbation of this pain, it is my opinion based on a reasonable degree of medical certainty that this is a continuation of his injury that he sustained last year rather than a new injury.

Dr. Blankenship again reiterated this opinion in his deposition testimony wherein he stated:

A. ... I still feel like the majority of the patient's need for continued treatment is related to that February [April] injury of '06. And the reason for that is largely bla - - based on clinical history.

The mechanism of that injury is much more likely to cause a symptomatic disk problem than the injury that he had in '07. You know, in '06 he was - - he caught a steel beam as it was going forward. That forward or flexion-type injury adds significant increased pressure to the disk space. That's more likely.

The other thing is, is that according to the patient - - and I don't have anything to refute that - - he did get

better after treatment with that, but he still had some persistent pain and then when he reinjured his back. But the pain he has been having is essentially the same type of pain, same location of pain since that injury of 2006, in February [April], when he caught the steel beam. So the majority of my reasoning is based on his clinical history.

Accordingly, based upon the testimony of the claimant which I find to be credible regarding his continued complaints after he was released in June 2006 as well as the opinion of Dr. Blankenship which I find to be credible and entitled to great weight, I find that claimant's need for additional medical treatment and his resulting disability is causally related to the injury which occurred on April 15, 2006. Therefore, respondent #1 is liable for payment of compensation benefits.

Accordingly, respondent #1 is liable for payment of temporary total disability benefits beginning May 7, 2007 and continuing through a date yet to be determined. In addition, respondent #1 is also liable for payment of all reasonable and necessary medical treatment provided in connection with claimant's compensable low back injury.

Given the agreement by the two carriers that the only issue to be litigated at the time of the hearing was which carrier was responsible for payment of compensation benefits, claimant requested payment of benefits pursuant to A.C.A. §11-9-806. That statute provides that when the only dispute in the claim is which carrier is the proper source of payment, the Commission shall direct that appropriate compensation benefits be paid on an equal basis by the carriers. Once the issue is eventually resolved, the prevailing respondent is entitled to reimbursement from the other respondent of all monies paid together with interest at the legal rate from the date of payment. Based upon the parties' agreement, I entered an interim order on January 31, 2008 pursuant to A.C.A. §11-9-806 directing the carriers to pay claimant benefits on an equal basis. I also noted that so long as all workers' compensation benefits are paid to the claimant the carriers were free to reach an agreement as to the amount and/or percentage to be paid by each carrier.

My finding in this case requires respondent #1 to pay claimant compensation benefits. However, respondent #1 has the right to appeal this decision. Therefore, until this issue is resolved by way of a final order I find that both respondent #1 and respondent #2 should continue paying claimant temporary total disability benefits as well as appropriate medical benefits. Again, these benefits are to be paid on an equal basis unless the parties reach some other agreement with respect to the amount and/or percentage. In the event this order becomes final and resolves this issue, then respondent #1 is hereby ordered to reimburse respondent #2 all the monies paid by respondent #2 together with interest at the legal rate from the date of payment. This includes the additional benefits to which the parties have agreed claimant is entitled as well as previous benefits paid by respondent #2 following the incident on February 27, 2007.

#### ORDER

\_\_\_\_\_ Claimant is entitled to additional temporary total disability benefits beginning May 7, 2007 and continuing through a date yet to be determined. Claimant is also entitled to additional medical treatment for his compensable low back injury. Respondent #1 is liable for payment of these compensation benefits. Until an order becomes final, the parties are to continue paying claimant compensation benefits pursuant to A.C.A. §11-9-806 on an equal basis or in an amount and/or percentage agreed to by the carriers. In the event this order becomes final, respondent #1 is directed to reimburse respondent #2 all monies paid together with interest at the legal rate from the date of payment. This includes all benefits paid subsequent to February 27, 2007. Claimant's attorney is entitled to the maximum attorney fee on all temporary total disability benefits beginning May 7, 2007 and continuing through a date yet to be determined.

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