

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F505201

DOUGLAS W. KING

CLAIMANT

**CITY OF LITTLE ROCK
(SELF-INSURED)**

RESPONDENT EMPLOYER

ORDER AND OPINION FILED APRIL 7, 2008

Hearing before Administrative Law JUDGE LINDA K. MARSHALL.

Claimant represented by the HONORABLE JIM JACKSON, Attorney at Law, Bryant, Arkansas.

Respondents represented by the HONORABLE BETTY J. HARDY, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

The above claim came on for a hearing in Little Rock, Arkansas on January 30, 2008. A prehearing conference was held on December 4, 2007 and a prehearing order was filed the same date. At the prehearing conference and before the hearing, the parties agreed to the following stipulations:

1. There was an employer-employee relationship on December 1, 2004.
2. The compensation rates are \$453/340.

The claimant contends that he sustained a compensable back injury on December 1, 2004, when he was involved in a motor vehicle accident. The claimant contends that he is entitled to medical benefits and temporary total disability benefits and attorney's fees. All other issues are reserved.

Respondents contend there was no compensable injury; at most, he had a temporary aggravation of a pre-existing degenerative condition in his lower back.

Respondents did pay some medical benefits until the claim was controverted on April 25, 2005. Respondents contend any treatment, to include surgery after April 25, 2005, was not reasonably necessary or causally related to the December 1, 2004, automobile accident.

Alternatively, respondents contend the claimant's entitlement to temporary total disability benefits would be January 17, 2006 until January 20, 2006, and from September 1, 2006 to October 16, 2006. Respondents contend those are dates that the record supports a physician took him off work because of complaints with his low back.

Respondents also contend if benefits are awarded the claimant, an offset is requested pursuant to Ark. Code Ann. §11-9-411 for group health benefits.

ISSUES TO BE LITIGATED

1. Compensability.
2. Medical benefits.
3. Temporary total disability and temporary partial disability benefits.
4. Attorney's fees.
5. Offset of group medical.

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 witnesses and to observe their 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. There was an employer-employee relationship on December 1, 2004.
2. The compensation rates are \$453/340.
3. The claimant proved by a preponderance of the evidence that he sustained a temporary aggravation to his pre-existing back condition. The temporary aggravation had resolved by April 25, 2005.
4. The claimant has failed to prove that additional medical was reasonable and necessary and specifically related to the December 1, 2004, vehicle accident.
5. The claimant has failed to prove by a preponderance of the evidence that he remained in his healing period and unable to earn wages because of his compensable injury from April 25, 2005 to October 16, 2006.
6. The claim for additional benefits is respectfully denied and dismissed.

DISCUSSION

The claimant, 45 years of age, is employed by the respondent employer as a police detective. The claimant began his employment with the respondent on June 1, 1981 and a majority of his time has been spent as a patrol officer. On December 1, 2004, the claimant was working as a patrol officer in a marked car and he was rear-ended by another vehicle. The claimant hit his head on the plexiglas shield behind the seat. The claimant sought medical treatment at Baptist Hospital and saw Dr. Evelyn Young in the emergency room. The claimant's main concern was his head but his back was not hurting really bad, just pulsating. The claimant was given pain pills and muscle

relaxers to take. The claimant called in sick on December 8, 2004, after having pain in his back and trouble sleeping. The claimant testified that his back was progressively getting worse and he left work early on December 19, 2004. On December 20, 2004, the claimant contacted the city about seeing a doctor and he saw Dr. Brenda Covington and was prescribed some medications and physical therapy. The claimant was referred to Dr. Kent Davidson and he had x-rays, a bone scan and medication and was released by Dr. Davidson in April 2005.

The claimant next saw his family doctor, Dr. Russell Burton, and was prescribed pain pills, muscle relaxers and some steroids. The claimant was next referred to Dr. Zachary Mason and he saw Dr. Amir Qureshi and received some steroid injections in his back, steroid packs and nerves burned. The claimant ultimately had surgery by Dr. Mason on September 1, 2006 and returned to work on October 9, 2006.

The claimant started light-duty work on March 22, 2005 and was able to work with some time off until his surgery on September 1, 2006. The claimant works as a detective now and has not seen Dr. Mason since October 2006 and has not sought any back pain treatment with his family doctor, Dr. Burton, since October 2006.

Under cross examination, the claimant verified the damage to the patrol car from his accident was approximately \$991. The claimant also verified that he had received a third-party settlement from the driver of the vehicle that rear-ended him and that amount was \$50,000. The claimant verified that a few days after a steroid injection, he was at Wal-Mart and he felt a pop in his back and had more pain after that. The claimant verified the following diagnostic tests: an MRI of the low back in January 2005, another MRI in September 2005, an EMG nerve conduction study in March 2005, another EMG

study in September 2005, bone scan in January 2005, and the surgery in September 2006.

ADJUDICATION

In order to prove a compensable injury as a result of a specific incident that is identifiable by time and place of occurrence, a claimant must establish (1) proof by a preponderance of the evidence of an injury arising out of and in the course of employment; (2) proof by a preponderance of the evidence that the injury caused internal or external harm to the body that required medical services; (3) medical evidence supported by objective findings establishing the injury; and (4) proof by a preponderance of the evidence that the injury was caused by a specific incident and identifiable by time and place of occurrence. Ark. Code Ann. §11-9-102(4) (Repl. 2005). If the claimant fails to establish by a preponderance of the evidence any of the requirements for establishing the compensability of the claim, compensation must be denied. *Mikel v. Engineering Specialty Plastics*, 56 Ark. App. 126, 938 S.W.2d 876 (1997).

After a review of the medical evidence and the claimant's testimony, I find the claimant has proven that he sustained a temporary aggravation to his pre-existing back condition; however, that aggravation had resolved by April 2005, at which time the respondents controverted the claim.

Certainly, there is no dispute that the claimant was involved in a motor vehicle accident requiring medical attention initially to the claimant's head. The claimant began

experiencing low back pain and was diagnosed with a lumbar strain and then a SI joint strain. Respondents initially accepted the claim as compensable but later controverted the claim on April 25, 2005, contending no objective findings. The claimant had diagnostic tests that revealed disc bulges; however, the January 27, 2005, MRI provides a history of muscle spasms. The muscle spasms meet the definition of “objective findings,” as required by Ark. Code Ann. §11-9-102(16).

On January 17, 2005, the claimant had a whole body scan following his complaints of back pain. This test revealed, “No evidence of acute trauma in the lumbosacral spine or bony pelvis. Peripheral arthritic or degenerative uptake about the acromioclavicular joints and left knee.” (Jt. Exh. No. 1, p. 49.) On February 21, 2005, Dr. Kent Davidson’s report notes that the claimant has reported significant pain improvement in his right S1 joint. The claimant had been receiving physical therapy and had a cortisone injection in the right S1 joint. The claimant did report that on February 13, 2005, his back popped and he had an increase in pain.

On December 6, 2007, Dr. Kent Davidson’s deposition was taken. Dr. Davidson was the first specialist who treated the claimant following his December 2004 vehicle incident. Dr. Davidson ordered a EMG/nerve conduction study on March 17, 2005 and the study was normal. The claimant continued to complain of persistent pain down the left leg and discomfort in the S1 joint region and the upper sacral region. Dr. Davidson opined that his assessment of the claimant did not provide objective findings to suggest a herniated nucleus pulposus or other significant structural problems. Dr. Davidson further stated that with an essentially normal examination, a normal bone scan, an equivocal MRI, a normal nerve conduction study, it continued to look like something that

stood a good likelihood of resolving on its own, like a bad sprain or strain. Depo., p. 20. Dr. Davidson was asked about the September 9, 2005, MRI and he found this report very consistent with the initial MRI report. Dr. Davidson went on to say, "Specifically, it describes a bit more of the degenerative processes that are present and perhaps brings into question a more significant disc bulge at the L5-S1 area than the initial MRI demonstrated. However, I will say it appears that if there is impingement on a nerve, it is related to both a bulge and an osteophyte, which is sort of a bone spur that is more of a degenerative process. So those two in combination may have created narrowing of one of the openings where the nerve passes through." Depo., p. 23.

Dr. Davidson opined that he would not have recommended surgery based on the MRI report. He was asked if anything in the report would relate the findings to the motor vehicle accident in December 2004. Dr. Davidson opined with a qualified no, and he stated the qualification relates to the asymmetrical nature of the bulge. Dr. Davidson confirmed that Dr. Mason's Operative Report indicates no evidence of an acute herniated nucleus pulposus. Dr. Davidson further stated about Dr. Mason's report: "It looks like most of his work was addressing the bone spurs and the degenerative changes in the spine." (Depo., p. 27.)

Dr. Davidson further opined that the claimant's "MRI and the surgery all indicated a degenerative process. Could the motor vehicle accident have triggered them to become symptomatic? Yes. Did he have clear evidence of a herniated disc? No." Dr. Davidson responded "Yes" to being questioned whether individuals with degenerative disc disease as the claimant's can become symptomatic without any triggering event. Dr. Davidson was questioned if the claimant could have become symptomatic based

upon the incident at Wal-Mart in February 2005, that the claimant described to him. Dr. Davidson responded, "It's possible." (Depo., p. 29.) Dr. Davidson opined that he could not state within a reasonable degree of medical certainty that Mr. King's need for treatment after April 11, 2005, was related to his motor vehicle accident of December 1, 2004.

Dr. Russell Burton, the claimant's family doctor, gave a deposition on November 14, 2007, and he gave an opinion about the cause of the claimant's low back problems.

It seems clear to me from my records that he had no history of back pain before the motor vehicle accident, and that he had persistent back pain following the motor vehicle accident; so I would correlate the two findings as being significant, that the back pain was a result of the motor vehicle accident. (D., p. 27, lines 11-17.)

Dr. Burton stated that he last saw the claimant on September 1, 2005. He further stated that he would defer to the orthopedic specialists in this case.

I give greater weight to the testimony of Dr. Davidson, an orthopedic surgeon, over the testimony of the family doctor, Dr. Russell Burton. Dr. Davidson continued to treat the claimant until April 11, 2005 and did not recommend surgery at that time. Dr. Davidson did review the operative report of Dr. Mason and opined that no acute disc herniation was found and that most of the surgery in September 2007 revolved around degenerative problems. On April 11, 2005, Dr. Davidson opined the claimant could work on modified duty and indicated the claimant continues to have pain with no objective findings. Certainly, an aggravation of a pre-existing, non-compensable condition by a compensable injury is, itself, compensable. *Liver v. Guardsmark*, 68 Ark. App. 24, 3 S.W.3d (1999), citing *Hublely v. Best Western-Governor's Inn*, 52 Ark. App.

226, 916 S.W. 2d 143 (1996). After taking into consideration the normal examination, normal bone scan, equivocal MRI and the normal nerve conduction study, Dr. Davidson opined the claimant's condition appeared to be a bad sprain or strain that would resolve on its own. Dr. Davidson diagnosed the claimant with lumbar strain and SI joint dysfunction with inflammation. Dr. Davidson's February 21, 2005, report indicates the SI joint strain was improved with the cortisone injection. The medical records do not demonstrate that the claimant sustained a herniated disc as a result of the December 1, 2004, compensable injury but instead aggravated his pre-existing degenerative disc disease. By April 11, 2005, the claimant had received medication, physical therapy, cortisone injections, testing and conservative care and was released to modified duty.

The claimant did confirm that he now has less back pain after the surgery. However, the surgical report indicates bone spurs and degenerative changes in the spine rather than acute herniations.

ORDER

The claimant proved by a preponderance of the evidence that he sustained a temporary aggravation to his pre-existing back condition. The temporary aggravation had resolved by April 25, 2005. The claimant has failed to prove that additional medical was reasonable and necessary and specifically related to the December 1, 2004, vehicle incident. The claimant has failed to prove by a preponderance of the evidence that he remained in his healing period and unable to earn wages because of his

compensable injury from April 25, 2005 to October 16, 2006. The claim for additional benefits is respectfully denied and dismissed.

IT IS SO ORDERED.

**LINDA K. MARSHALL
ADMINISTRATIVE LAW JUDGE**