

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**WCC NO. F613016**

**SAMUEL M. McINTYRE, EMPLOYEE** **CLAIMANT**

**WOODFIELD, INC., EMPLOYER** **RESPONDENT**

**RETENTION MANAGEMENT SERVICES, INC.,  
INSURANCE CARRIER/TPA** **RESPONDENT**

**OPINION FILED FEBRUARY 11, 2008**

Hearing conducted before Administrative Law Judge S. Dale Douthit in El Dorado, Union County, Arkansas.

Claimant was represented by Mr. Casey Castleberry, Attorney at Law, Batesville, Arkansas.

The respondents were represented by Ms. Melissa Wood, Attorney at Law, Little Rock, Arkansas.

**STATEMENT OF THE CASE**

A hearing was conducted on November 14, 2007, in El Dorado, Arkansas, to determine whether the claimant was entitled to additional workers' compensation benefits. A prehearing conference was conducted in this claim on August 29, 2007, and a Prehearing Order was filed on that same day. A copy of the Prehearing Order has been marked as Commission Exhibit "1" and made a part of the record herein without objection, subject to any modifications made on the record at the full hearing.

At the full hearing, the parties agreed to the following stipulations:

- 1) The employment relationship existed between the parties at all relevant times, including October 24, 2006.
- 2) That the claimant sustained a compensable injury as a result of

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the motor vehicle accident on October 24, 2006.

- 3) The claimant earned wages sufficient to entitle him to \$488.00 per week for temporary total disability and \$366.00 per week for permanent partial disability.
- 4) The respondents paid TTD through June 12, 2007, but all benefits beyond that date have been controverted.

By agreement of the parties at the full hearing, the following issues were presented for a determination:

- 1) Whether the claimant is entitled to additional TTD benefits.
- 2) Whether the claimant is entitled to additional medical treatment.
- 3) Whether the claimant's healing period has ended.

At the full hearing the claimant contended, in summary, that his healing period has not yet ended; that he is entitled to additional TTD benefits beginning June 13, 2007, to a date yet to be determined; that respondents should be responsible for all medical treatment after June 13, 2007, and all medical treatment now recommended. The claimant contended that he should be awarded a controverted attorney's fee on any additional benefits awarded and that any issues not specifically outlined herein should be reserved. Claimant also specifically reserves all issues related to permanency.

At the full hearing the respondents contended that all appropriate benefits have been paid with regard to the claimant's compensable injury. Respondents contend that

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claimant's need for medical treatment is associated with a preexisting degenerative problem and not any acute work related injury. Respondents maintain that they should not be liable for payment of benefits associated with the preexisting problems and that the medical documentation does not support entitlement to additional indemnity benefits.

The claimant testified on his own behalf, and was the only witness to testify at the full hearing. The record in this claim is composed solely of the transcript of the November 14, 2007, hearing containing numerous medical exhibits and other documentary evidence submitted on the record at the full hearing.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing 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 hereby made in accordance with A.C.A.

§ 11-9-704:

- 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 has failed to prove, by a preponderance of the credible evidence, that he is entitled to additional temporary total

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disability benefits.

- 4) The claimant has proven by a preponderance of the evidence that all medical treatment contained in the record herein is reasonable, necessary, and related to his stipulated compensable injury. As such, respondents are responsible for all medical treatment contained in the record, including, but not limited to, all bills and travel related expenses the claimant incurred with Dr. Nunley after June 13, 2007.
- 5) I find that the claimant has not reached maximum medical improvement, and therefore find that the respondents are liable for all reasonable, necessary, and related medical expenses now recommended by the claimant's primary care physician, Dr. Nunley.

**DISCUSSION**

The claimant began working for Woodfield, Inc. on July 5, 2006, as a truck driver. On October 24, 2006, while performing his employment duties, the claimant was in a motor vehicle accident which caused stipulated compensable injuries to his neck and back.

The claimant testified that he did not immediately go to the doctor after his motor vehicle accident, instead he waited until the next day to go see Dr. Daniels in Camden, Arkansas. The claimant testified that Dr. Daniels gave him cortisone shots and put him off work for five days. The claimant testified that approximately ten to fourteen days after his compensable injuries he went back to work for Woodfield driving a truck. The claimant testified that after he returned he was attempting to look

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out his right mirror when a sharp pain shot up the back of his neck. The claimant testified that he then went to see Dr. Daniels again. The claimant testified that he then underwent several weeks of physical therapy and was recommended surgery by Dr. Akin.

The claimant testified that he wanted a second opinion regarding possible surgery and received a Change of Physician order from the Workers' Compensation Commission to Dr. Nunley. The claimant testified that respondents paid for his first visit to Dr. Nunley; however, the claimant testified that the respondents refused to pay any medical treatment after his first visit with Dr. Nunley. The claimant testified that although respondents quit paying after his initial visit with Dr. Nunley, that he continued to see Dr. Nunley in order to receive treatment for his back and neck. In the last medical records from the Spine Institute of Louisiana, Dr. Nunley states: "... significant soft disk herniation, right-sided C5 and right-sided C5-6. The patient had an on-the-job injury and regardless of his previous degenerative changes in his neck, this is definitely more likely than not related to his on-the-job injury." (Cl. Ex. 1, pg. 12). The August 22, 2007, report from the Spine Institute of Louisiana states: "Dr. Nunley still wants to proceed with a bilateral C6 selective nerve root block. Dr. Nunley reiterated today that he does believe this is related to his accident. Even though he does have some degenerative changes in his neck, he had no previously

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reported pain.” (Cl. Ex. 1, pg. 13).

The claimant has contended that he is still in his healing period and that the respondents should be responsible for all medical treatment contained in the record and all continued additional medical treatment, as well as TTD benefits from June 13, 2007, to a date yet to be determined.

Temporary total disability is that period within the healing period in which an employee suffers a total incapacity to earn wages. Ark. State. Hwy. & Transp. Dept. v. Breshears, 272 Ark. App. 244, 613 S.W.2d 392 (1981). “Disability” means incapacity because of injury to earn, in the same or any other employment, the wages which the employee was receiving at the time of the injury. The Commission may consider the claimant’s physical capabilities and evaluate his ability to engage in any gainful employment. The claimant bears the burden of proving both that he remains within his healing period and, in addition, suffers a total incapacity to earn pre-injury wages in the same or other employment. Palazolo v. Nelms Chevrolet, 46 Ark. App. 130, 877 S.W.2d 938 (1994).

The claimant bears the burden of proving his entitlement to temporary total disability benefits. In my opinion, the claimant has failed to prove that he is totally disabled from engaging in any gainful employment. The record clearly reflects that the claimant is capable of working. In fact, the record reflects that the claimant

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continued working after his admitted compensable injury. Further, contained in the record herein is a Functional Capacity Evaluation conducted on the claimant which demonstrated that claimant's ability to work at the heavy physical demand classification. (R. Ex. 1, pp. 6-21). Although I do find that the claimant is still within his healing period from his stipulated compensable injury, I find that the claimant has failed to prove that he is totally disabled from engaging in any gainful employment. Dr. Peeles in his independent medical evaluation report states: "I have no basis on which to prevent him from returning to work as a tractor-trailer driver." (R. Ex. 1, pg. 37). The record reflects that the claimant is capable of working and since the claimant has failed to prove that he is totally disabled from engaging in gainful employment, I find that claimant's request for temporary total disability benefits is denied.

As stated above, I do find that the claimant is still within his healing period from his stipulated compensable injury. It must be pointed out that prior to the claimant's October 24, 2006, compensable injury, claimant never had any problems with his back or neck. The claimant's testimony regarding no prior neck or back problems was credible and uncontroverted by the respondents. Nothing in the record indicates that the claimant had any type of neck or back problems prior to the motor vehicle accident on October 24, 2006. It is equally important to note that this is a stipulated compensable injury. Although the medical records do show the claimant

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has degenerative disk disease and spondylosis, the claimant never had to be treated for any of these conditions prior to his compensable event in October of 2006. Whether the claimant sustained a compensable aggravation of a preexisting condition or a separate compensable injury altogether, it is still a compensable injury and the Workers' Compensation Act requires employers to provide such medical services as may be reasonably necessary in connection with an employee's injury. A.C.A. § 11-9-508.

In making my decision that the claimant is still within his healing period, I do not disregard the reports from Drs. Burns or Peoples regarding their determination that the claimant's condition is degenerative, chronic pathology. However, one cannot overlook the "right sided herniated disc at C4-5" (R. Ex. 1, pg. 30), "The exiting C5 nerve root is compressed and highly likely to be symptomatic" (R. Ex. 1, pg. 25) and other recommendations of surgery. Dr. Peoples quotes a report from Dr. Akin wherein Dr. Akin stated: "The MRI shows a right sided herniated disc at C4-C5. This correlates with the symptoms. Because the symptoms coincide with the NVC, and the herniated disc is the only finding which explains the symptoms, I feel the herniated disc is most likely the result of the on the job injury. A C4-C5 anterior cervical decompression or decompression of the right C5 nerve root was offered." (R. Ex. 1, pg. 30). Not only did Dr. Akin recommend a surgical procedure on the claimant, Dr.

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Pierce Nunley in his July 19, 2007, report stated: “Ultimately, he is probably going to require reconstructive procedure.” (Cl. Ex. 1, pg. 12).

The medical records contained herein show muscle spasms, nerve root compression, herniated discs, and recommendations of surgery. It must be pointed out that none of these conditions were diagnosed prior to the claimant’s stipulated compensable injury, and the claimant never missed work because of a back or neck injury prior to the stipulated compensable injury. I recognize that Drs. Peeples and Burns opined that the claimant’s etiology is most likely due to his chronic pathology, degenerative disc disease and spondylosis. However, even Dr. Burns in his December 18, 2006, report states: “Acute disc herniation cannot completely be excluded ... ” (R. Ex. 1, pg. 2). Also, two other doctors opined that the claimant’s herniated discs are most likely the result of the claimant’s on-the-job injury. Dr. Akin stated: “... I feel the herniated disc is most likely the result of the on the job injury.” (R. Ex. 1, pg. 30). Further, Dr. Nunley in his July 19, 2007, report stated: “The patient had an on-the-job injury and regardless of his previous degenerative changes in his neck, this is definitely more likely than not related to his on-the-job injury.” (Cl. Ex. 1, pg. 12). Dr. Nunley was referring to the claimant’s soft disc herniation at C4-5 and C5-6 when referring to causation in his July 19, 2007, report.

What constitutes reasonably necessary medical treatment under A.C.A.

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§ 11-9-508 is a question of fact for the Commission. Geo Specialty Chemical, Inc. v. Clingan, 69 Ark. App. 369, 13 S.W.3d 218 (2000). In the instant case, I find that claimant is entitled to the medical treatment contained in the record herein and the additional medical treatment related to the claimant's back and neck recommended by Dr. Nunley; respondents are ordered to pay for said treatment. Respondents are responsible for the additional treatment recommended by Dr. Nunley, including, but not limited to, the possible surgery recommended by Dr. Akin, all related pharmaceutical expenses, and all related travel expenses for the claimant's medical treatment.

**AWARD**

Respondents are hereby directed and ordered to pay for the medical treatment contained in the record herein and the additional recommended treatment by Dr. Nunley, including, but not limited to, the expenses contained in the record after June 12, 2007, the additional treatment now recommended by Drs. Nunley and Akin, related pharmaceutical expenses and related travel expenses.

**IT IS SO ORDERED.**

SDD/pjb

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**S. DALE DOUTHIT**  
**Administrative Law Judge**