

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F511401

WILLIAM D. PRANTER

CLAIMANT

HERBIE DANIELL, D/B/A DANIELL HEATING

RESPONDENT EMPLOYER

OHIO CASUALTY INSURANCE CO.

RESPONDENT CARRIER NO. 1

SECOND INJURY FUND

RESPONDENT NO. 2

**NUNC PRO TUNC ORDER
FILED AUGUST 4, 2008**

Hearing before Administrative Law JUDGE LINDA K. MARSHALL.

Claimant represented by the HONORABLE JAMES S. STREET, Attorney at Law, Hot Springs, Arkansas.

Respondents No. 1 represented by the HONORABLE JEREMY SWEARINGEN, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

The Administrative Law Judge, on her own motion, finds a clerical error exists in the Order and Opinion filed July 31, 2008. The Order and Opinion reflects some discrepancies in dates of total temporary disability where credit was given to respondents. The Commission is authorized to correct clerical errors and this is a proper case for exercise of that authority. Ark. Code Ann. §11-9-713(d) (Repl. 1996).

The Order and Opinion filed on July 31, 2008, is hereby modified only to correct the incorrect dates of total temporary disability. In all other respects, the Order and Opinion shall remain the same.

The above claim came on for a hearing on June 6, 2008, in Hot Springs, Arkansas. A prehearing conference was held on April 15, 2008 and a prehearing order

was filed the same date. A copy of the prehearing order was admitted into evidence without objection as Commission Exhibit No. 1.

At the prehearing conference, the parties agreed to the following stipulations:

1. There was a compensable lumbar injury on October 14, 2005.
2. The compensation rates are \$303/227.

The claimant contends that he is entitled to ongoing medical treatment for the lumbar injury and additional temporary total disability benefits from January 31, 2008, to a date to be determined and attorney's fees.

Respondents contend that the additional medical and particularly the fusion surgery that Dr. James Arthur had previously suggested is not reasonably necessary in relation to the claimant's compensable injury. While the back injury was not controverted, respondents contend the injury was a temporary aggravation of long-standing and pre-existing chronic and severe conditions and the claimant's condition from the back injury resolved, leaving him with the effects of his long-standing, pre-existing chronic problems. Respondents contend that any back surgery is not reasonably necessary in relation to the injury.

Respondents further contend that as of August 23, 2006, the claimant was released back to light-duty work for his back after having reached maximum medical improvement from both of his carpal tunnel conditions. Respondents contend light duty was not available at the respondent employer but the claimant was able to work in some capacity elsewhere. Respondents also request overpayment credit for the temporary total disability benefits paid from August 24, 2006 through January 31, 2008.

ISSUES TO BE LITIGATED

1. Additional medical benefits.
2. Additional temporary total disability benefits.
3. Overpayment credit.
4. Attorney's fees.

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 a compensable lumbar injury on October 14, 2005.
2. The compensation rates are \$303/227.
3. The claimant has proven by a preponderance of the evidence that the additional medical treatment recommended by Dr. James Arthur is reasonable and necessary.
4. Respondents remain responsible for the reasonable and necessary medical treatment.
5. The claimant has failed to prove by a preponderance of the evidence that he remained in his healing period and was totally unable to earn wages from August 24, 2006, to a date to be determined.

6. Respondents are entitled to a credit of indemnity benefits for its overpayment of indemnity benefits from August 24, 2006 through January 31, 2008.

7. No indemnity benefits have been awarded herein. An attorney's fee may be awarded only on indemnity benefits owed and controverted. Ark. Code Ann. §11-9-715. Therefore, no attorney's fees are awarded.

DISCUSSION

The claimant, 34 years old, began his employment with the respondent in November 2004, where he was a journeyman electrician. The claimant was involved in a vehicle accident on Friday, October 14, 2005, where he did not seek immediate medical treatment. The night of the accident the claimant began experiencing lower back pain. On Sunday, October 16, 2005, the claimant saw Dr. Roy Puen for the first time and he ordered an MRI. Dr. Puen referred the claimant to Dr. Michael Young. The claimant saw Dr. Young for a couple of visits and received some therapy and then was sent to Dr. Scott Schlesinger for an independent medical evaluation. The claimant next saw Dr. James Arthur and his treatment plan was the same as Dr. Schlesinger's. The claimant began seeing Dr. Arthur and Dr. Arthur referred the claimant for EMG studies for his hands. The EMG studies revealed carpal tunnel syndrome in both wrists and surgery was performed by Dr. Arthur while the claimant continued ongoing conservative care for his back condition.

On June 28, 2006, the claimant underwent a steroid injection in his lumbar region. The relief from the shot was only temporary. By August 23, 2006, Dr. Arthur released the claimant to light-duty work with restrictions. The claimant's employer could not meet the restriction requirements; therefore, the claimant did not return to work.

The claimant continued with three steroid injections and was still having back pain. Dr. Arthur ordered a discogram and that was performed on October 31, 2006. The claimant testified that he was in great pain after the discogram and he took Demerol and pain medication and ultimately tried a lumbar corset. The claimant next saw Dr. Reza Shahim for another independent medical evaluation and two additional options were proposed, a facet rhizotomy and an IDET procedure. Dr. Arthur had recommended a disc fusion or a disc replacement surgery. The claimant was not interested in the disc replacement surgery. The claimant did undergo the facet rhizotomy procedure performed by Dr. Donald Boos in Hot Springs, a left side rhizotomy in September 2007, and a right side rhizotomy in December 2007.

The claimant testified that the rhizotomies helped with arthritic pain but he continues to have the intense back pain. The relief from the rhizotomies is beginning to wear off now. The last visit with Dr. Arthur was December 21, 2007. The claimant tries to cut his grass once a week with a push mower. The claimant has to rest during the day. The claimant has not sought other employment or additional schooling.

Under cross examination, the claimant confirmed that he had previously been involved in some motor vehicle accidents where he had back pain. The claimant confirmed that he was taking Soma in 2001 for back muscle spasms and was changed to Flexeril in 2002. The claimant further confirmed that in 2002 and 2003, he was having pain and numbness and tingling in his arms going down to his hands and fingers and he sought chiropractic care for this condition. The claimant described his back problems in 2003 and 2004, as muscular tension.

The claimant confirmed that he has not sought other employment following Dr. Arthur's light-duty release in August 2006. The claimant continues to hunt deer, turkey and bear, and he keeps trash off his in-law's property and he posts no trespassing signs. The claimant has traveled to Orlando, to Oklahoma City, and to Florida for a jewelry convention since his 2005 injury.

Respondents had some surveillance of the claimant and the claimant described what was going on during one of the surveillance periods. According to the claimant, he had a plumbing pipe that burst and he had two buddies come over to work on it. The claimant was seen turning off the water at the main line and moving up the steps quickly.

ADJUDICATION

Ark. Code Ann. §11-9-508(a) (Supp. 2005) provides that an employer shall promptly provide for an injured employee such medical treatment as may be reasonably necessary in connection with the injury received by the employee. The employee has the burden of proving by a preponderance of the evidence that medical treatment is reasonable and necessary. *Hamilton v. Gregory Trucking*, 90 Ark. App. 248, 205 S.W.3d 181 (March 16, 2005). What constitutes reasonably necessary treatment under the statute is a question of fact for the Commission. *Id.* The Commission has the authority to accept or reject medical opinions and its resolution of the medical evidence has the force and effect of a jury verdict. *Estridge v. Waste Mgmt.*, 343 Ark. 276, 33 S.W.3d 167 (2000).

In the present case, I find the claimant has proven by a preponderance of the evidence that the additional medical treatment from Dr. Arthur is reasonable and necessary in relation to the claimant's compensable injury. Dr. Arthur has recommended a fusion surgery for the claimant in light of the problems the claimant continues to experience. The claimant's MRI reveals a central annular tear at L5-S1 resulting in a broad based disk protrusion. There is disk desiccation and loss of disk height. The claimant has taken medication, participated in physical therapy, had rhizotomies, had injections and still has not had sufficient relief. Dr. Arthur is the claimant's authorized treating physician and he has been treating the claimant since February 15, 2006.

Respondents requested the claimant see Dr. Scott Schlesinger for an independent medical evaluation on February 10, 2006. Dr. Schlesinger reviewed the two MRIs and performed his evaluation and opined that he did not feel the lumbar spine problem was surgical in nature but did recommend some epidural steroid injections and therapy. Dr. Schlesinger saw the claimant on one occasion.

Respondents also requested the claimant see Dr. Reza Shahim for another independent medical evaluation on May 17, 2007. Dr. Shahim recommended the claim consider facet rhizotomies and IDT. Dr. Shahim further stated that if these two procedures were not helpful, he should consider surgical decompression and fusion. On September 27, 2007, a radiofrequency lumbar facet joint nerve denervation was performed. A decision was made not to pursue the IDET.

Respondents were quite concerned that the medical reports following the compensable October 14, 2005, injury did not detail the claimant's previous back

complaints. However, in his April 28, 2008, deposition, Dr. Arthur discussed the claimant's diagnostic tests, describing an acute ruptured disk with a high water content. He described this as being an acute injury and not a chronic condition. Dr. Arthur opined the claimant's condition was consistent with something specific causing the injury, the October 14, 2005, automobile accident. The claimant's medical reports before the October 14, 2005, incident do list some back pain and some arm and hand pains and medication was prescribed for muscle spasms; however, there was no diagnostic testing that provided objective findings for specific conditions. Dr. Arthur testified in his April 28, 2008, deposition that his surgical recommendation was based on the claimant's level of symptoms and complaints and on the claimant's response to treatments such as the epidural steroid injections, the physical therapy and the work hardening programs.

I give Dr. Arthur's opinion more weight, since he is the treating physician and has more experience with the claimant and his symptoms, history and condition. Drs. Schlesinger and Shahim had one opportunity to look at the claimant and review what medical that was sent to each of them. Dr. Shahim stated in his report that he did not have access to the MRIs but did examine the claimant.

The claimant next contends that he is entitled to temporary total disability benefits from January 31, 2008, to a date to be determined, as well as from August 24, 2006 through January 31, 2008. In order to be entitled to temporary total disability benefits, the claimant must remain in his healing period and be totally unable to earn wages. *Ark. State Hwy. & Transp. Dept. v. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981).

In the present case, the claimant has failed to prove by a preponderance of the evidence that he remained in his healing period and totally unable to earn wages from January 31, 2008 through a date to be determined. I further find the claimant has also failed to prove by a preponderance of the evidence that he remained in his healing period and was totally unable to earn wages from August 24, 2006 through January 31, 2008. Dr. Arthur, on July 12, 2006, assigned the claimant a 10% permanent impairment rating and on August 23, 2006, he placed some restrictions on the claimant and returned him to work. The claimant's employer did not have work within those restrictions, according to the claims adjuster. The claimant testified that he did not seek other employment. The claimant continued to take medication, had a discogram, and had the facet joint nerve denervation after Dr. Arthur's release. At Dr. Arthur's April 28, 2008, deposition, he stated that the claimant had the same restrictions as of August 23, 2006, and that if he could find work he could tolerate, he could proceed with that. While I found the claimant's testimony about his continued back pain to be genuine, I was not persuaded that the claimant had actually attempted to find and at least try some work activities following the restricted release by Dr. Arthur. The claimant has proven that he can be active by cutting his own yard and by participating in his hobbies, such as hunting. Both activities are physical and certainly demonstrate the claimant is not totally inactive. In finding the claimant has not proven that he is totally unable to earn wages and still in his healing period, I rely on Dr. Arthur's August 23, 2006, release with restrictions and then the claimant's activities at home and for recreation and his lack of motivation to seek other employment. There were no medical reports after January 31, 2008, taking the claimant off work.

Respondents have requested a credit for overpayment of temporary total disability from August 24, 2006 through January 31, 2008. Respondents are relying on Dr. Arthur's deposition testimony where he opined the claimant reached maximum medical improvement from his carpal tunnel surgery on August 23, 2006. Dr. Arthur was asked what he would assess as a rating for the carpal tunnel and he gave a percentage rating. A medical report assigning this rating was not a part of the evidence submitted. The medical in evidence does not indicate that the claimant has reached maximum medical improvement for his back, although Dr. Arthur stated in his deposition that he was trying to get the claimant back to work and he assigned a 10% rating. Dr. Arthur, on July 12, 2006, wrote in his "Plan" the amount of 10% PPI but he also recommends physical therapy three times a week for four weeks. Finally, on August 23, 2006, Dr. Arthur did recommend the claimant return to work with restrictions. Dr. Arthur continued to see the claimant after August 23, 2006, and the claimant had a discogram, tried the lumbar corset, had a rhizotomy and continued to take medication. The claimant testified that his employer did not have a job for him and he did not seek another job. In light of Dr. Arthur's release with restrictions and with the claimant not attempting other employment, I am constrained to find the claimant has failed to prove that he remained in his healing period and was totally unable to earn wages from August 24, 2006 through January 31, 2008. Respondents are entitled to a credit of indemnity benefits for its overpayment.

ORDER

The claimant has proven by a preponderance of the evidence that the additional medical treatment recommended by Dr. Arthur is reasonable and necessary.

Respondents remain responsible for the reasonable and necessary medical treatment. The claimant has failed to prove by a preponderance of the evidence that he remained in his healing period and was totally unable to earn wages from January 31, 2008, to a date to be determined and also from August 24, 2006 through January 31, 2008. Respondents are entitled to a credit of indemnity benefits for its overpayment of indemnity benefits from August 24, 2006 through January 31, 2008.

No indemnity benefits have been awarded herein. An attorney's fee may be awarded only on indemnity benefits owed and controverted. Ark. Code Ann. §11-9-715. Therefore, no attorney's fees are awarded.

IT IS SO ORDERED.

**LINDA K. MARSHALL
ADMINISTRATIVE LAW JUDGE**