

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. G002335

CHARLES GREENLEE, Employee	CLAIMANT
KITCHEN DISTRIBUTORS, INC., Employer	RESPONDENT
FIRSTCOMP INSURANCE COMPANY, Carrier	RESPONDENT

OPINION FILED JANUARY 12, 2010

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

Claimant represented by JASON HATFIELD, Attorney, Fayetteville, Arkansas.

Respondents represented by RANDY MURPHY, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

On December 15, 2010, the above captioned claim came on for a hearing at Springdale, Arkansas. A pre-hearing conference was conducted on October 21, 2010, 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 employee/employer/carrier relationship existed among the parties at all relevant times.
3. The claimant sustained a compensable injury to his back on March 12, 2010.
4. The claimant was earning an average weekly wage of \$574.00 which would entitle him to compensation at the weekly rates of \$383.00 for total disability and \$287.00 for permanent partial disability benefits.

At the time of the hearing respondent confirmed that in addition to accepting a

compensable injury to claimant's low back the respondent also accepted as a compensable an injury to the claimant's right shoulder.

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

1. Claimant's entitlement to additional medical treatment as recommended by Dr. Blankenship, including pain management, physical therapy, an evaluation by Dr. Cox, and a myelogram.

2. Temporary total disability benefits from May 7, 2010 through a date yet to be determined.

3. Attorney fee.

The claimant contends he sustained a compensable injury while working for respondent on March 12, 2010 at which time he sustained a right shoulder and low back injury as a result of a twisting fall. He contends he is entitled to the payment of additional medical treatment and temporary total disability benefits from May 7, 2010 through a date yet to be determined as well as an attorney fee.

The respondents contend that all benefits to which the claimant is owed have been paid and that claimant was released by Dr. Moffitt at maximum medical improvement on May 7, 2010 with a five percent impairment rating and that any problems the claimant is currently experiencing are not related to his compensable injury.

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 October 21, 2010, and contained in a pre-hearing order filed that same date,

are hereby accepted as fact.

2. The parties' stipulation that claimant also suffered a compensable injury to his right shoulder is also hereby accepted as fact.

3. Claimant has met his burden of proving by a preponderance of the evidence that he is entitled to additional medical treatment as recommended by Dr. Blankenship.

4. Claimant is entitled to temporary total disability benefits beginning May 7, 2010 and continuing through a date yet to be determined.

5. Respondent has controverted claimant's entitlement to all unpaid indemnity benefits.

FACTUAL BACKGROUND

_____ This claimant suffered a prior work-related injury to his low back in 1990 which resulted in a fusion surgery by Dr. Raben. Following that injury the claimant was assigned a permanent physical impairment rating in an amount equal to 25% to the body as a whole. In a report dated October 4, 1991, Dr. Raben recommended that claimant perform light-duty work and he also predicted that claimant could expect to have flare-ups of low back pain from time to time.

After his release claimant returned to work performing jobs which were not necessarily light duty in nature but instead manual jobs such as roofing and according to his testimony he did have flare ups with his low back pain from time to time as predicted by Dr. Raben. Claimant testified that when these flare ups occurred he would seek medical treatment, get medication, and then quit taking the medication when his condition resolved.

In May 2007 the claimant began working for the respondent, a company which unloaded and distributed cabinets in newly constructed apartments. Claimant testified that the cabinets weighed from 10 to 85 pounds. Claimant further testified that their job duties

required them to carry cabinets up and down stairs and navigate through construction debris at various construction sites.

On March 12, 2010, the claimant was at an apartment complex under construction in Norman, Oklahoma unloading cabinets for two buildings. Claimant testified that he was carrying a double drawer which weighed approximately 85 pounds up a flight of stairs and that when he got to the top of the stairs a nail caught his boot lace and when he took his next step he twisted and fell landing on his right shoulder and right hip with the cabinet landing on top of him. Claimant testified that he injured his right shoulder and low back as a result of this incident. Claimant called his office manager, Debra, and reported this injury after it occurred.

Claimant sought medical treatment the next day from the emergency room at the Northwest Medical Center in Springdale. At that time claimant was complaining of pain in his low back and right shoulder. Claimant was diagnosed as suffering from acute low back pain and was given medication and instructed to receive follow-up treatment with his family physician, Dr. Wilson. Claimant was evaluated by Dr. Wilson on March 17, 2010 and he diagnosed claimant's condition as low back pain, shoulder contusion, and chronic back pain. Dr. Wilson prescribed claimant medication, physical therapy, and work restrictions.

After this visit with Dr. Wilson, claimant was sent by the respondent to Dr. Moffitt for an evaluation on March 26, 2010. Dr. Moffitt diagnosed claimant's condition as right shoulder and low back pain. He recommended that claimant continue working with restrictions and ordered claimant to undergo physical therapy for his low back and right shoulder.

After undergoing the physical therapy claimant was next evaluated by Dr. Moffitt on April 16, 2010, at which time claimant indicated that while his shoulder was improving it was still weak and that his back condition had not improved. As a result, Dr. Moffitt ordered MRI scans of the claimant's shoulder and low back. The MRI scan of the

claimant's right shoulder dated April 19, 2010 was read as showing no rotator cuff tear, but a small amount of fluid in the bursa. Claimant also underwent a CT scan on his low back which according to Dr. Moffitt revealed only degenerative changes. Based upon these test results Dr. Moffitt in a report dated April 23, 2010 indicated that claimant should continue with exercises he had learned in physical therapy and continue working with his same restrictions.

Claimant was next evaluated by Dr. Moffitt on May 7, 2010. At that time, Dr. Moffitt opined that claimant had reached maximum medical improvement and he recommended no additional medical treatment other than continuing with exercises and he also assigned permanent work restrictions so that claimant would not injure his back further. These permanent work restrictions included no lifting, pushing, or pulling with more than 20 pounds of force, limited bending and twisting at the waist, and sitting and standing on an as-needed basis.

Following his release by Dr. Moffitt, claimant filed for and received a change of physician order to Dr. Blankenship, neurosurgeon. Claimant was evaluated by Dr. Blankenship on August 24, 2010, with complaints of low back and right shoulder pain. Dr. Blankenship noted that the claimant's CT scan of his low back was of poor quality. He recommended that claimant be evaluated by Dr. Cannon for an evaluation and possible injection therapy. He also recommended that the claimant undergo aggressive active physical therapy and that claimant be evaluated by Dr. Cox for his right shoulder. Dr. Blankenship indicated that if claimant's condition had not improved in six weeks he would recommend a lumbar myelography with CT reconstructions.

Claimant has filed this claim contending that he is entitled to additional medical treatment as recommended by Dr. Blankenship. He also requests temporary total disability benefits beginning May 7, 2010, and continuing through a date yet to be determined, as well as a controverted attorney fee.

ADJUDICATION

_____ Claimant has the burden of proving by a preponderance of the evidence that he is entitled to additional medical treatment. *Dalton v. Allen Engineering Co.*, 66 Ark. App. 201, 989 S.W. 2d 543 (1999). Furthermore, although there appears to be some contention that no objective findings exist establishing the need for additional medical treatment, a claimant is not required to show by objective evidence that his healing period continues for purposes of temporary total disability benefits or additional medical treatment. *Williams v. Prostaff Temporaries*, 336 Ark. 510, 988 S.W. 2d 1 (1999); *Chamber Door Industries, Inc. v. Graham*, 59 Ark. App. 224, 956 S.W. 2d 196 (1997).

Respondent contends that claimant's compensable low back and right shoulder injuries were simply temporary aggravations of pre-existing conditions which have resolved. I disagree and find that claimant has met his burden of proving by a preponderance of the evidence that he is in need of additional medical treatment for his compensable low back and right shoulder injuries.

There is no question that this claimant had a pre-existing condition with regard to his low back as a result of an injury in 1990 which resulted in fusion surgery by Dr. Raben. Claimant was assigned a 25% impairment rating following that prior injury. In addition, Dr. Raben also predicted at that time that claimant would continue to have periodic flare ups of low back pain in the future. According to claimant's testimony he did have periodic flare ups of his low back pain for which he sought medical treatment. However, claimant testified that these flare ups also dissipated after he took medication as opposed to his current condition which has continued since the date of his injury on March 12, 2010. A review of the medical records supports claimant's testimony that while he did have periodic flare ups, this was not a continuing problem for which he was receiving medical treatment. For instance, claimant was evaluated by Carolyn Nutter, a physician's assistant, on October 23, 2006 for a urinary tract infection. That medical report notes active problems

of anxiety syndrome, insomnia, and tobacco dependency. No mention is made in the medical report of any complaints of low back pain at that time. In addition, the medical records also indicate that in 2007 claimant sought medical treatment from a chiropractic physician after he was struck in the head by a cabinet while working for the respondent. Claimant was evaluated by the chiropractic physician on four separate occasions with complaints of neck and mid back pain but no indication of any low back complaints.

On January 7, 2009 claimant was evaluated by Dr. Wilson for complaints of low back pain and he was given medication and work restrictions for the next one to two weeks. Subsequent medical records from Dr. Wilson dated July 1, 2009 and September 17, 2009 indicate that claimant was evaluated for other conditions without any current complaints of low back pain.

Furthermore, even though claimant had a pre-existing low back injury, the claimant did have an admittedly compensable injury to his low back as a result of the incident on March 12, 2010. In support of its contention that claimant merely suffered a temporary aggravation of his pre-existing low back condition, respondent relies in part upon the opinion of Dr. Moffitt finding that claimant had reached maximum medical improvement as of May 7, 2010. First, I believe it is important to note that at his deposition Dr. Moffitt admitted that when he released claimant he was still complaining of the same back and radicular pain he had at the time of his first visit.

Q. Now, you would agree, in regard to Mr. Greenlee, he came in complaining of back pain and radicular pain, and he had that same back and radicular pain the last time you saw him?

A. Yes, I agree.

Dr. Moffitt went on to admit that the physical therapy did not help claimant's condition. Significantly, I believe it should be noted that in his report of May 7, 2010 finding that claimant had reached maximum medical improvement, Dr. Moffitt indicated that

claimant had not returned to his baseline condition.

At the time of his injury he was doing heavy work lifting cabinets. He injured himself while doing this activity. He has not gotten back to his baseline.

Finally, Dr. Moffitt also testified at his deposition that he did not disagree with Dr. Blankenship's recommendation of a myelogram if necessary to determine the condition of a disc bulge at L3-4 which was only minimally visualized on the CT scan.

In contrast to the opinion of Dr. Moffitt who is a general practitioner is the opinion of Dr. Blankenship, a neurosurgeon. Dr. Blankenship is a specialist who has recommended that claimant undergo additional medical treatment for his compensable injury. This includes physical therapy, an evaluation by Dr. Cannon for possible injection therapy, and an evaluation by Dr. Cox for claimant's right shoulder injury. If claimant's condition does not improve Dr. Blankenship recommends that claimant undergo a lumbar myelography with CT reconstructions.

I find that the opinion of Dr. Blankenship is entitled to great weight. Dr. Blankenship is a specialist as compared to Dr. Moffitt. Furthermore, as previously noted, Dr. Moffitt admitted that claimant's condition had not returned to its baseline at the time he released claimant on May 7, 2010. Accordingly, based upon the evidence presented, specifically, the opinion of Dr. Blankenship, I find that claimant has met his burden of proving by a preponderance of the evidence that he is entitled to additional medical treatment for his compensable low back and right shoulder injuries as recommended by Dr. Blankenship.

Claimant also contends that he is entitled to temporary total disability benefits beginning May 7, 2010, and continuing through a date yet to be determined. On May 7, 2010, Dr. Moffitt authored a report indicating that claimant had reached maximum medical improvement. However, in that same report Dr. Moffitt also placed significant permanent work restrictions on the claimant. When claimant returned to the respondent with those

work restrictions, he was informed that respondent did not have any work available. Claimant testified that he has not looked for any work since that date and did not believe he was capable of working due to the pain in his back and right shoulder. In his report dated August 24, 2010, Dr. Blankenship notes that claimant has not worked in six weeks and he does not indicate that he could return to work.

In order to be entitled to temporary total disability benefits, the claimant has the burden of proving by a preponderance of the evidence that he remains within his healing period and that he suffers a total incapacity to earn wages. *Arkansas State Highway & Transportation Department v. Breshears*, 272 Ark. 244, 613 S.W. 2d 392 (1981). I find that claimant has remained within his healing period based upon Dr. Blankenship's opinion that claimant is in need of additional medical treatment for his right shoulder and low back. I also find based upon claimant's testimony which I find to be credible that he has suffered a total incapacity to earn wages since May 7, 2010. Claimant was informed by respondent that work was not available within the permanent restrictions imposed upon him by Dr. Moffitt. In addition, claimant testified that due to his low back and right shoulder pain he would not be capable of working at the present time. Significantly, Dr. Blankenship did not opine that claimant was capable of returning to work at the time of his visit on August 24, 2010.

Accordingly, based upon the foregoing evidence, I find that claimant is entitled to temporary total disability benefits beginning May 7, 2010 and continuing through a date yet to be determined.

AWARD

Claimant has met his burden of proving by a preponderance of the evidence that he is entitled to additional medical treatment for his compensable low back and right shoulder injuries. In addition, claimant is entitled to temporary total disability benefits

beginning May 7, 2010 and continuing through a date yet to be determined. Respondent has controverted claimant's entitlement to all unpaid indemnity benefits.

Pursuant to A.C.A. §11-9-715(a)(1)(B), claimant's attorney is entitled to an attorney fee in the amount of 25% of the compensation for indemnity benefits payable to the claimant. Thus, claimant's attorney is entitled to a 25% attorney fee based upon the indemnity benefits awarded. This fee is to be paid one-half by the carrier and one-half by the claimant. Also pursuant to A.C.A. §11-9-715(a)(1)(B), an attorney fee is not awarded on medical benefits.

The respondents are ordered to pay the court reporter's charges for preparing the hearing transcript in the amount of \$384.00.

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.

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE _____
