BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. G407176

OSCAR SMITH, Employee	CLAIMANT
TRULOVE DIRTWORKS, Employer	RESPONDENT
CNA INSURANCE COMPANY, Carrier	RESPONDENT

OPINION FILED JANUARY 13, 2016

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

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

Respondents represented by FRANK B. NEWELL, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

On December 16, 2015, the above captioned claim came on for a hearing at Springdale, Arkansas. A pre-hearing conference was conducted on November 4, 2015, 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 in the form of bruising and other superficial injuries to his lumbar spine on August 28, 2014.

4. The respondent has paid some compensation benefits including medical and disability.

At the time of the hearing the parties agreed to stipulate that claimant earned an average weekly wage of $661.00 which would entitle him to compensation at the rates of $441.00 for total disability benefits and $331.00 for permanent partial disability benefits.

In addition, the parties also agreed to stipulate that respondent had paid claimant temporary total disability benefits through June 25, 2015.

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

1. Claimant's entitlement to medical treatment in the form of lumbar fusion surgery as recommended by his treating physicians.

2. Temporary total disability benefits from date last paid through a date yet to be determined.

3. Attorney fee.

4. Credit for temporary total disability paid for days worked.

The claimant contends he sustained a compensable injury while working for respondent on or about August 28, 2014. At that time, claimant was in the course and scope of his employment with respondent when he injured his low back. There have been multiple recommendations for lumbar fusion surgery by both Dr. Bruffett and Dr. Cunningham that have been controverted by the respondents.

The respondents contend that claimant sustained a new lumbar injury such as bruising and/or a recurrence of symptoms associated with a pre-existing non-compensable disc herniation. Respondents have no liability for fusion surgery at L5-S1, the opinion of Dr. Bruffett, claimant's most recent evaluating physician, being that there is no objective sign of any new injury at L5-S1, the site of the proposed surgery. Respondents have no liability for additional weekly benefits, there being no evidence that claimant's lumbar condition has not returned to its baseline, pre-accident condition. Claimant is at MMI for any compensable condition following from his August 28, 2014 accident.

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 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 November 4, 2015, and contained in a pre-hearing order filed that same date, are hereby accepted as fact.

2. The parties' stipulation that claimant earned an average weekly wage of $661.00 which would entitle him to compensation at the rate of $441.00 for total disability benefits and $331.00 for permanent partial disability benefits is also hereby accepted as fact.

3. The parties' stipulation that respondent paid claimant temporary total disability benefits through June 25, 2015, is also hereby accepted as fact.

4. Claimant has met his burden of proving by a preponderance of the evidence that he is entitled to additional medical treatment for his compensable injury in the form of lumbar fusion surgery as recommended by his treating physician, Dr. Cunningham.

5. Claimant has met his burden of proving by a preponderance of the evidence that he is entitled to additional temporary total disability benefits beginning June 26, 2015 and continuing through a date yet to be determined.

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

FACTUAL BACKGROUND

The claimant is a 47-year-old man with an eleventh grade education. Claimant testified that while in school he was in special education classes and made Ds and Fs. Claimant testified that he cannot read. Claimant currently lives in Coloma, Michigan with his parents. Claimant began working for the respondent in January 2014 as a heavy equipment operator; he operated bulldozers, track hoes, Bobcats, and tractors.

On August 28, 2014, claimant was using his track hoe to run over ground numerous times when a cable came out of the bucket on the machine. Claimant testified that as he

stopped to exit the machine he was holding onto a bracket when it gave way causing him to fall four to five feet to the ground and on to his left side. Claimant testified that he landed on his left hip on hard clay, rocks, and grooves from the tracks.

After his fall claimant was taken by a co-employee to the emergency room at the North Arkansas Regional Medical Center where he was diagnosed as suffering multiple contusions of the trunk area resulting from a fall. Claimant was treated with medication and instructed to return to work in two days. Claimant testified that he has not worked for the respondent or any other employer since the date of his accident on August 28, 2014.

The medical records indicate that claimant continued to have complaints of low back pain and an MRI scan was performed on September 2, 2014. The scan was read as showing a broad based protrusion with annular tear at the L5-S1 level. As a result of these findings, claimant was eventually referred to a neurosurgeon, Dr. Cunningham.

Dr. Cunningham's initial evaluation of the claimant occurred on September 22, 2014. Dr. Cunningham's initial impression was that claimant suffered from lumbar radiculopathy, stenosis of the lumbar spine, and congenital spondylolisthesis. Dr. Cunningham opined that claimant was not a candidate for surgery at that time given the short duration of his symptoms and his obesity. Instead, Dr. Cunningham recommended pain management.

On October 1, 2014, claimant was evaluated by Dr. Woodward who worked with Dr. Cunningham at the Springfield Neurological & Spine Institute. Dr. Woodward prescribed claimant medication and recommended physical therapy. In a report dated October 22, 2014, Dr. Woodward stated that claimant had indicated that therapy was making him sore. At that time Dr. Woodward continued claimant's medication and recommended lumbar injections. Dr. Woodward subsequently recommended a TENS unit trial for four weeks.

Claimant was evaluated again by Dr. Cunningham on December 1, 2014. He noted that claimant's treatment with Dr. Woodward had provided no relief and as a result, he was recommending that claimant lose 25 pounds and then undergo a decompression and

fusion procedure.

In response to Dr. Cunningham's recommendation for surgery, respondent had claimant evaluated by Dr. Bruffett, neurosurgeon. Dr. Bruffett's evaluation of the claimant occurred on February 27, 2015, and in his report of that date he notes that claimant suffers from a herniated disc at the L5-S1 level with direct L5 nerve root impingement. Dr. Bruffett went on to indicate that surgery was a reasonable option for claimant.

In response to a letter written to him by Attorney Newell, Dr. Bruffett in a letter dated March 11, 2015 noted that some of claimant's lumbar findings were present prior to the injury. However, he also noted that claimant now suffered from an accompanying disc herniation which was compressing the L5 nerve root. In a letter dated May 20, 2015, Attorney Newell sent a letter to Dr. Bruffett enclosing the MRI scan from April 8, 2011, as well as prior medical records showing claimant's complaints of back pain in 2011, 2012, and 2013. After reviewing those medical records, Dr. Bruffett in a report dated June 1, 2015 stated that the MRI study of September 2, 2014 showed the same disc herniation as the MRI scan from April 8, 2011. Therefore, in his opinion there was no objective change in the two studies with regard to the L5-S1 level. Accordingly, Dr. Bruffett stated that he could not define any objective injury that occurred in August 2014.

Respondent accepted a compensable injury in the form of bruising and other superficial injuries to claimant's lumbar spine on August 28, 2014. Respondent paid various compensation benefits including temporary total disability benefits through June 25, 2015. However, respondent has not accepted liability for the surgery recommended by Dr. Cunningham and Dr. Bruffett based upon Dr. Bruffett's subsequent opinion of June 1, 2015.

Claimant has filed this claim contending that he is entitled to additional medical treatment in the form of lumbar fusion surgery as recommended by his treating physicians. He also requests payment of additional temporary total disability benefits beginning June

26, 2015 and continuing through a date yet to be determined as well as a controverted attorney fee.

ADJUDICATION

Claimant contends that he is entitled to additional medical treatment in the form of lumbar fusion surgery as recommended by his treating physicians for his August 28, 2015 compensable injury. A respondent is only required to provide medical services that are reasonably necessary for treatment of the compensable injury. A.C.A. §11-9-508(a). What constitutes reasonably necessary medical treatment is a question of fact for the Commission. *White Consolidated Industries v. Gallaway*, 74 Ark. App. 13, 45 S.W. 3d 396 (2001)(citing *Gansky v. Hi-Tech Engineering*, 325 Ark. 163, 924 S.W. 2d 790 (1996). Furthermore, claimant has the burden of proving by a preponderance of the evidence that medical treatment is reasonable and necessary. *Patchell v. Wal-Mart Stores, Inc.*, 86 Ark. App. 230, 184 S.W. 3d 32 (2004).

After reviewing the evidence in this case impartially, without giving the benefit of the doubt to either party, I find that claimant has met his burden of proving by a preponderance of the evidence that he is entitled to additional medical treatment in the form of lumbar fusion surgery as recommended by Drs. Cunningham and Bruffett.

First, it is important to note that claimant had a history of low back complaints prior to his fall on August 28, 2014. Medical records from Dr. Lyman dated May 8, 2008 indicate that claimant was diagnosed as suffering from arthritis at the L5-S1 level. Subsequent medical records from Dr. Lyman indicate that claimant had complaints of low back pain radiating down his left leg and that Dr. Lyman treated claimant with narcotic pain medication. In a report dated December 15, 2010, Dr. Lyman noted that claimant's OxyContin had been discontinued, but that claimant's chronic back pain was stable on his current non-hepatotoxic medication.

A subsequent medical record dated January 13, 2011 from South Haven Health

System indicates that claimant was misusing his prescription medication which resulted in a violation of his controlled substance agreement with Dr. Lyman.

Based upon claimant's continued complaints of pain, an MRI scan was performed on April 8, 2011, which revealed spondylosis at the L5 level and degenerative changes at the L5-S1 level. The MRI scan was read as showing no evidence of disc herniation.

Medical records from Dr. Leslie subsequent to the MRI scan indicate that claimant was prescribed physical therapy. A report from Dr. Leslie dated September 26, 2012 indicates that claimant was still being diagnosed with low back pain and was provided medication. Finally, a report from Dr. Leslie dated May 3, 2013 listed back pain along with various other ailments at the time of that evaluation.

Notably, Dr. Cunningham was not aware of this history of claimant's prior low back complaints. In fact, Dr. Cunningham's report of September 22, 2014 indicates that claimant denied a chronic history of medically managed low back pain.

In denying liability for the surgical procedure, respondent relies in large part upon the opinion of Dr. Bruffett as set forth in his report of June 1, 2015. As previously noted, Dr. Bruffett was provided a copy of claimant's MRI scan from April 8, 2011, and after comparing that MRI to the MRI of September 2, 2014, it was Dr. Bruffett's opinion that the same disc herniation at the L5-1 level was present on both scans. Accordingly, respondent contends that while claimant did fall on August 28, 2014, his only injury was bruising or a recurrence of symptoms associated with a pre-existing non-compensable disc herniation and that those injuries have healed and claimant has returned to his pre-accident condition. Therefore, any surgery for a herniated disc is not causally related to the August 28, 2014 injury, but rather is a result of a pre-existing non-compensable injury.

An employer takes an employee as it finds him and employment circumstances which aggravate pre-existing conditions are compensable. *Nashville Livestock Commission v. Cox*, 302 Ark. 69, 787 S.W. 2d 664 (1990); *Heritage Baptist Temple v.*

Robison, 82 Ark. App. 460, 120 S.W. 3d 150 (2003). I find that claimant's fall of August 28, 2014 not only resulted in new bruising, but also aggravated claimant's pre-existing low back condition to the point that surgery is now necessary.

First, there is no indication that claimant was under any active medical care for his low back at the time of his fall or during the eight months he was employed by the respondent. Claimant testified that he was able to perform his job with the respondent and wage records introduced into the record indicate that out of 32 weeks claimant worked for the respondent, he worked overtime hours in 21 weeks. In fact, payment records indicate that claimant generally worked overtime four or five days each week.

Furthermore, there is no indication that claimant was taking any pain medication for any low back complaints during the time he was employed by the respondent. Respondent submitted into evidence medication logs from claimant's pharmacy in Michigan as well as a pharmacy in Harrison. Those records do not reveal any medication subsequent to October 2011.

In short, it was only after claimant's fall on August 28, 2014 that his low back became symptomatic and eventually resulted in recommendations for surgery. Notably, Dr. Bruffett in his original report of February 27, 2015 described claimant's condition as "quite symptomatic from his herniated disc in the neural foramen at L5-S1 on the left,..." While claimant had a history of low back complaints which resulted in treatment in the form of narcotic pain medication, there is no indication that claimant was suffering from any low back complaints prior to the fall on August 28, 2014. Thus, I find that the fall on that date aggravated claimant's pre-existing low back condition and has now resulted in the need for surgical treatment. While Dr. Bruffett was of the opinion that the herniated disc at the L5-S1 level existed as of the MRI scan on April 8, 2011, that condition apparently became asymptomatic and claimant was not receiving any medical treatment for that condition until it became symptomatic following the fall on August 28, 2014.

Having suffered an aggravation of a pre-existing condition, claimant is entitled to payment for medical treatment associated with treatment of that aggravation. In this particular case, that includes surgery which has been recommended by both Dr. Cunningham and Dr. Bruffett. I find that claimant has met his burden of proving by a preponderance of the evidence that this surgery is reasonable and necessary medical treatment for claimant's compensable fall of August 28, 2014.

The second issue for consideration involves claimant's request for additional temporary total disability benefits. As previously noted, respondent paid claimant temporary total disability benefits through June 25, 2015. In order to be entitled to temporary total disability benefits 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 met his burden of proof. Claimant remains within his healing period based upon the surgical recommendations of both Drs. Cunningham and Dr. Bruffett. In addition, I also find based upon the medical evidence presented as well as claimant's testimony that he suffers a total incapacity to earn wages as a result of his compensable injury. Therefore, I find that claimant is entitled to additional temporary total disability benefits beginning June 26, 2015 and continuing through a date yet to be determined.

In awarding claimant temporary total disability benefits, I note that respondent submitted into evidence a video purporting to show the claimant. I have assigned no weight to this video for two reasons. First, claimant testified that the individual in the video is not him, but instead is his son. The video was taken by a field investigator, Roy Van Cole, Jr., who testified that he could not refute claimant's testimony that the individual on the video was his son and not the claimant. Finally, even if the individual on the video were found to be claimant, it is not relevant as to the issue of whether claimant is entitled to

additional medical treatment or whether he is entitled to temporary total disability benefits. The individual on the video spends less than two minutes standing in a driveway smoking a cigarette. Claimant testified that his son smokes, but that he does not.

AWARD

Claimant has met his burden of proving by a preponderance of the evidence that he is entitled to additional medical treatment in the form of lumbar fusion surgery as recommended by Drs. Cunningham and Bruffett. Claimant has also met her burden of proving by a preponderance of the evidence that he is entitled to temporary total disability benefits from June 26, 2015 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 $602.00.

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