

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F505366

SCHEDRICK RINGO,
EMPLOYEE

CLAIMANT

CENTRAL MALONEY, INC.,
SELF-INSURED EMPLOYER

RESPONDENT

CROCKETT ADJUSTMENT,
TPA

RESPONDENT

OPINION FILED JULY 10, 2007

Upon review before the FULL COMMISSION in Little Rock,
Pulaski County, Arkansas.

Claimant represented by the HONORABLE KENNETH OLSEN,
Attorney at Law, Little Rock, Arkansas.

Respondents represented by the HONORABLE MICHAEL DENNIS,
Attorney at Law, Pine Bluff, Arkansas.

Decision of Administrative Law Judge: Affirmed and
Adopted.

OPINION AND ORDER

Respondents appeal an opinion and order of the
Administrative Law Judge filed February 28, 2007. In
said order, the Administrative Law Judge made the
following findings of fact and conclusions of law:

1. That the Arkansas Workers' Compensation
Commission has jurisdiction of this claim.
2. The employee/employer/carrier relationship
existed at all relevant times, including April
25, 2005.
3. The claimant earned sufficient wages to
entitle him to the maximum applicable
compensation rates.

4. Claimant worked April 26, 2005 - April 28, 2005; May 2, 2005 - May 6, 2005; May 8, 2005 - May 11, 2005. He received workers compensation benefits for the period May 12, 2005 through May 25, 2005 in the amount of \$932.00; and June 9, 2005 through August 17, 2005, in the amount of \$932.00 every two weeks for five periods, for a total of ten weeks; and he received accident and sickness benefits beginning August 25, 2005 through February 19, 2006, in payments totaling \$4,714.24; and resumed working on February 20, 2006.
5. The claimant sustained a compensable injury on April 25, 2005, which was accepted as compensable. Benefits were paid through August 17, 2005, and any benefits claimed subsequent to August 17, 2005, have been controverted.
6. Claimant has proven by a preponderance of the evidence that his need for additional medical treatment from Dr. Chakales, including the surgery in June of 2006, is reasonable and necessary and causally related to his compensable work-related injury in April of 2005.
7. Claimant has proven by a preponderance of the evidence that he is entitled to continued temporary total disability benefits from date of injury until the date he returned to work, February 20, 2006, to the extent the amount of temporary total benefits owed exceed the amount of sickness and accident benefits paid.
8. Respondents have controverted claimant's entitlement to additional medical benefits and additional temporary total disability benefits from August 17, 2005 until February 20, 2006.
9. The respondents are entitled to an offset for medical and other benefits paid by group health or disability insurance, per Ark. Code Ann. § 11-9-411.

10. Claimant is entitled to the maximum attorney's fee on the disability benefits awarded herein, one-half to be paid by the respondents and one-half to be withheld from the claimant's award of benefits.

We have carefully conducted a de novo review of the entire record herein and it is our opinion that the Administrative Law Judge's decision is supported by a preponderance of the credible evidence, correctly applies the law, and should be affirmed. Specifically, we find from a preponderance of the evidence that the findings made by the Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission.

We therefore affirm the February 28, 2007 decision of the Administrative Law Judge, including all findings of fact and conclusions of law therein, and adopt the opinion as the decision of the Full Commission on appeal.

All accrued benefits shall be paid in a lump sum without discount and with interest thereon at the lawful rate from the date of the Administrative Law Judge's decision in accordance with Ark. Code Ann. § 11-9-809 (Repl. 2002).

Since the claimant's injury occurred after July 1, 2001, the claimant's attorney's fee is governed by the

provisions of Ark. Code Ann. § 11-9-715 as amended by Act 1281 of 2001. Compare Ark. Code Ann. § 11-9-715 (Repl. 1996) with Ark. Code Ann. § 11-9-715 (Repl. 2002). For prevailing on this appeal before the Full Commission, claimant's attorney is hereby awarded an additional attorney's fee in the amount of \$500.00 in accordance with Ark. Code Ann. § 11-9-715(b) (Repl. 2002).

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

PHILIP A. HOOD, Commissioner

Commissioner McKinney dissents.

DISSENTING OPINION

I must respectfully dissent from the majority opinion finding that the claimant is entitled to additional temporary total disability benefits and finding that additional medical treatment from Dr. Chakales is reasonable and necessary in connection with the claimant's compensable injury. Based upon my de novo review of the entire record, I find that the claimant has failed to meet his burden of proof.

The claimant sustained an admittedly compensable injury on April 25, 2005, when he was helping to push a transformer and felt a pain in his back. The claimant was treated for this injury on April 29, 2005, at Health Care Plus where he was found to have muscle spasms bilaterally in the lower L4, L5, and S1 range. An MRI was ordered. The results of the MRI revealed a central herniation of disc material at the L4-L5 area resulting in narrowing of the central canal at that level. The claimant was then referred to Dr. P.B Simpson, a neurosurgeon. In his report dated June 4, 2005, Dr. Simpson thoroughly examined the claimant and specifically noted the absence of any muscle spasms at that time. Having treated the claimant for lower back pain in 2002, Dr. Simpson compared the claimant's MRI results from this injury to the MRI results from 2002 and noted, "MRI of his lumbar area shows that he has some disk bulging centrally at 4-5, a little bit at 5-S1, the same thing he had basically back in 2002." Dr. Simpson diagnosed the claimant with a lumbar strain and held the claimant off work for a couple of weeks.

After being released to return to work by Dr. Simpson in June of 2005, the claimant returned to work until August 17, 2005, when he began drawing Sickness

and Accident pay. On February 20, 2006, after exhausting his Sickness and Accident leave, the claimant returned to work until he took off for surgery on June 26, 2006.

The claimant began treating with Dr. Harold Chakales with complaints of neck and back pain on August 1, 2005. Dr. Chakales ordered an EMG/NCV, a cervical MRI and a lumbar myelogram and post myelogram CT. The EMG/NCV yielded normal results. The cervical MRI produced mild degenerative findings. The lumbar myelogram and post myelogram CT revealed the same findings as the previous two MRIs, "a broad based posterior bulge with associated central protrusion at L4/5, ...associated degenerative spurring....spinal stenosis...." When Dr. Chakales recommended surgery, Dr. P.B. Simpson was asked to review the claimant's medical records and provide a second opinion. In his report dated March 24, 2006, Dr. Simpson detailed the films from February 27, 2002, May 9, 2005, and November 11, 2005. With regard to this films, Dr. Simpson noted:

I think if you can look at his MRI on 2/27/02 exam #14380 SA5/5 image #11/19, one can see that he has some disk bulging there centrally and some area in his canal on that at the L4-5 space. This is seen on the ER600 TE14, which should be the T1 weighted study. On the same slice, 11/19 on the T2 weighted image this

is a 3500TR with a TE99EF, you can see that the disk bulge is into the thecal sac there also.

On the axial views on the sagittal view done 2/27/02, exam #14380 sequence #4/4, image #6/12 on the T2 weighed 3000 with a TE of 98, one clearly sees that the disk is bulging and pushing into the thecal sac on both that film and also on image #5/12 and 7/12 just off the midline on both sides. The T2 weighed images on the sagittals, sequence #2, image #6, 7, and 8, one sees the disk bulging on these sagittal views also on the exam of 5/9/05. Basically, it looks like similar findings in 2005 and 2002. It is a little bit difficult to compare because the machine sequence probably was a little bit different. Basically, the same thing in 2002 and 2005 is seen, especially on the sagittal views. On the axial views, the sequence is 5. On the 5/9/05, one sees some disk bulging at T1 on the TR7500 T14 causing a little bit of spinal canal stenosis there. Basically, the changes seen in 2002 and 2005 are not dissimilar. Comparing the films of 10/17/05, I have a report but I do not have the films. Again, some of the findings we see on the myelogram may have been seen as similar things back in 2002 and 2005.

Contrary to Dr. Simpson's detailed comparison and explanation, Dr. Chakales responded to a written inquiry from claimant's attorney in which he simply wrote "Yes" to the question of whether the claimant's "on the job injury of 4/25/05 either caused, or combined

with a pre-existing condition to cause, the need for treatment and current period of disability." There is no evidence that Dr. Chakales was ever made aware of the claimant's pre-existing degenerative condition, let alone review the MRI films from 2002. Obviously, Dr. Chakales has been providing medical treatment to the claimant and has just as much incentive to link his treatment to the claimant's on the job injury as the claimant does. When he prepared these one word responses to the questionnaire, Dr. Chakales was recommending surgery for the claimant for which he clearly wanted to be paid. Even in his more lengthy report of January 12, 2006, in which Dr. Chakales outlined the claimant's need for surgery, Dr. Chakales displayed a clear lack of knowledge regarding the claimant's pre-existing lumbar condition. As detailed in Dr. Simpson's March 24, 2006, report, the findings relied upon by Dr. Chakales to justify surgery plainly and clearly existed in 2002.

The Arkansas Court of Appeals has repeatedly held:

The test for determining whether a subsequent episode is a recurrence or an aggravation is whether the subsequent episode was a natural and probable result fo the first injury or if it was precipitated by an independent intervening cause. Bearden Lumber Co. v. Bond, 7 Ark. App. 65, 644 S.W.2d 321 (1983). If

there is a causal connection between the primary and the subsequent disability, there is no independent intervening cause unless the subsequent disability is triggered by activity on the part of the claimant which is unreasonable under the circumstances. Guidry v. J & R Eads Constr. Co., 11 Ark. App. 219, 669 S.W.2d 483 (1984).

Georgia-Pacific Corp. v. Carter, 62 Ark. App. 162, 969 S.W.2d 677 (1998).

As noted by the Court of Appeals in Davis v. Old Dominion Freight Line Inc., 69 Ark. App. 74, ___ S.W.2d ___ (January 26, 2000):

the overriding issue in cases involving subsequent injury of disability is 'whether there is a *causal connection* between the primary injury and the subsequent disability,' and only if such a connection exists does the question of the claimant's conduct need to be addressed.

An aggravation is defined as "a new injury resulting from an independent incident." Farmland Ins. Co. v. Dubois, 54 Ark. App. 141, 923 S.W.2d 883 (1996). An aggravation, being a new injury with an independent cause, must meet the requirements for a compensable injury. Ford v. Chemipulp Process, Inc., 63 Ark. App. 260, 977 S.W.2d 5 (1998). A recurrence is defined as "a natural and probable consequence of a prior injury."

Weldon v. Pierce Brothers Construction, 54 Ark. App. 344, 925 S.W.2d 179 (1996).

Based upon my de novo review of the entire record, I find that the claimant's present condition is a recurrence of his pre-existing lumbar injury and not an aggravation. At best, the claimant sustained a temporary aggravation when he experienced the new objective medical findings of muscle spasms upon his initial examination on July 29, 2005. By August when the claimant was examined by Dr. Simpson, the temporary aggravation had resolved when no more muscle spasms were detected. The underlying, pre-existing condition which ultimately resulted in surgery did not produce any new objective medical findings raising it to the level of an aggravation. On the contrary, the claimant's underlying condition presented itself as a recurrence as it did not display anything new on the diagnostic testing. Dr. Simpson expertly detailed the similarities between the old films and the new films and deemed them to be the same. As such, the claimant's new period of disability and need for treatment is simply the "natural and probable consequence of a prior injury." Accordingly, I find that the claimant has failed to prove by a

preponderance of the evidence that he is entitled to any additional benefits.

Therefore, for all the reasons set forth herein, I must respectfully dissent from the majority opinion.

KAREN H. MCKINNEY, Commissioner