

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F600350

MATT D. WATSON,  
EMPLOYEE

CLAIMANT

TERIS, LLC,  
EMPLOYER

RESPONDENT

LIBERTY INSURANCE CORPORATION,  
INSURANCE CARRIER

RESPONDENT

OPINION FILED MAY 15, 2007

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

Claimant represented by the HONORABLE GREGORY R. GILES,  
Attorney at Law, Texarkana, Arkansas.

Respondents represented by the HONORABLE FLOYD M. THOMAS,  
JR., Attorney at Law, El Dorado, Arkansas.

Decision of Administrative Law Judge: Affirmed.

OPINION AND ORDER

The respondent appeals an administrative law judge's  
opinion filed November 30, 2006. The administrative law  
judge found that the claimant proved he sustained a  
compensable injury. The administrative law judge found that  
the claimant proved he was entitled to reasonably necessary  
medical treatment and temporary total disability  
compensation. After reviewing the entire record *de novo*,

the Full Commission affirms the opinion of the administrative law judge.

I. HISTORY

The record indicates that Matthew David Watson, age 27, underwent a "physical for Teris" on March 2, 2005. No apparent physical abnormalities were indicated. Mr. Watson testified on direct examination:

Q. And what was the job that you were hired to perform at Teris?

A. T.S.D.

Q. You will have to tell us what T.S.D. is.

A. What we did is we shipped out the things that they couldn't burn there, that they couldn't dispose of there. We got that ready to be shipped out....

Q. What were these materials shipped in?

A. Different size drums....Metal drums and plastic drums.

Q. Like a 55 gallon drum? Is that what you are talking about?

A. Yes, sir....There were different sizes. There was 55 gallon drums. I think there was a 40, there was even 5 gallon buckets, just a lot of different size containers....

Q. On this job were you required to do any lifting and carrying?

A. Yes, sir....Quite a bit. We have to move the different drums from pallet to pallet because whenever we shipped them, they could not be on plastic pallets, they had to all be on wooden pallets or on the floor....

Q. Now, these drums that you were transporting out, did you physically have to lift every one of those and put them on something or did you have a piece of equipment that you were able to use to do the lifting?

A. We usually had equipment with the forklifts. We had certain things, things that we called the claw or whatever, that would actually grab hold of the drums and pick them up, and we had some that would kind of wrap around them and pick them up, but there was always some that you couldn't do that with, they were just these kind of containers that they wouldn't grab....

The claimant presented to Dr. Larry Horn, D.C., on August 2, 2005 for symptoms of "constant lower back pain." A series of "Soap Notes" beginning August 2, 2005 apparently purport to show that muscle spasm was observed in the claimant's low back area.

The claimant testified on direct:

Q. What was it that happened on October 14, 2005, that led you to file this claim?

A. I'm not sure exactly how it happened but -

Q. Tell us what you were doing.

A. I was transferring one 55 gallon drum from a plastic pallet to a wooden pallet and I was rolling it and I just kind of felt a pain and a pop in my back, but I went ahead and finished....

Q. Was this a 55 gallon drum that was empty or was it full?

A. It was full.

Q. Do you have any idea what it weighed full?

A. It was around 400 or 500 pounds....

Q. Were you having to do this by yourself or did you have someone with you?

A. I was doing it by myself.

Q. And at what point did you think that you might have hurt yourself?

A. I felt the pop in my back and I felt the pain but I really didn't think all that much about it.

Q. What were you doing in the moment in time when you felt this pop?

A. I was transferring the drum. I was rolling the drum....

Q. Did you tell anybody or report to anybody what had happened at that moment?

A. I told the guy that I was working with, I told him that I didn't think it was nothing serious and I didn't want to cause no problems or anything so I just finished out my day.

Q. Did you go to a supervisor or anything at that point?

A. No, sir.

The parties' Joint Exhibit No. 1, page 8A, indicates that the claimant was complaining of back pain on or about October 18, 2005. Handwritten notes from the exhibit are mostly illegible but do appear to indicate that the claimant had been feeling back pain. Dr. Richard Davis assigned work restrictions on October 18, 2005.

A Workers Compensation - First Report Of Injury Or Illness was prepared for the claimant on October 18, 2005. According to the First Report Of Injury Or Illness, the claimant reported that he had suffered a back strain at 7:00 a.m. on October 14, 2005. The alleged injury was described on the Report: "Transfer (sic) from poly pallet to wood pallet so it could be load on out bound trailer for shipment on drum over to roll and felt something pop in back area." It was also written on the First Report, "did not report to super Lincoln Brown."

Dr. Davis returned the claimant to work at full duty on October 31, 2005. Dr. Davis again assigned work restrictions on November 16, 2005. The claimant agreed on

cross-examination that he did not work after November 25, 2005.

An MRI study of the claimant's lumbar spine was performed on December 6, 2005, with the conclusion, "Posterior central disc herniation L4-5 with narrowing of the neural foramina bilaterally, more prominently seen on the right."

Dr. Reza Shahim examined the claimant on January 16, 2006:

Mr. Watson is a pleasant 26 year old gentleman. He reports an on job injury on 10/14/05. This resulted in severe low back pain, right hip, and right leg pain. The right hip and leg pain has improved. He still has intermittent right leg weakness. The majority of pain is in the lower back. He has not been able to work due to back pain. He also complains of generalized weakness in the right leg....

He is a material handler for the past 10 months, but it (sic) not currently working. Last date worked was 11/25/05....

I reviewed a lumbar spine MRI. He has a moderate disc herniation at L4-5, more to the right side....

Mr. Watson has an on job injury, reportedly resulting in his back and leg symptoms. He may require a lumbar diskectomy. I would recommend lumbar epidural

injection and physical therapy first. If his symptoms were to continue, we would discuss surgical options. He is agreeable with this treatment.

The claimant was given an epidural injection on January 24, 2006.

Dr. Shahim advised the claimant to remain off work until seen back on February 21, 2006.

Dr. Shahim noted on February 21, 2006:

He has undergone an epidural steroid injection with no improvement in his symptoms. He still has significant axial back pain and pain radiating into both hips....

I reviewed his lumbar spine MRI with him and his wife again. He has a moderate to large disc herniation at L4-5 centrally, causing canal stenosis and lateral recess stenosis more on the right side....Because of the severity of his symptoms, he would prefer to have surgery. We will plan on lumbar decompression and diskectomy at L4-5.

Dr. Shahim planned to perform a lumbar laminectomy on March 6, 2006, and he stated that the claimant would need to remain off work for approximately six to eight weeks following surgery.

Dr. Shahim noted the following on March 20, 2006:

I saw Mr. Watson today and he is still having significant right leg pain. He also complains of axial back pain. The incision has healed well and the staples

were removed today. Mr. Watson had a large central disc herniation at L4-5 with a large annular tear. His symptoms are most likely related to the collapse of the disc space from the large disc herniation. Since there is a chance of recurrent disc herniation I will obtain an MR of the lumbar spine. He also complains of right shoulder pain. The pain is along the border scapula on the right side. That is unrelated to lumbar disc disease....

Dr. Shahim advised the claimant to remain off work for one month.

The claimant testified that following surgery, "It took me a little while to - I was feeling more pain at first, from the surgery I guess, but after a little while I started feeling better and it actually did help."

A pre-hearing order was filed on May 30, 2006. The claimant contended that he sustained a compensable injury to his back on or about October 14, 2005. The claimant contended that he was entitled to temporary partial disability "from 10/14/05 through 11/24/05, and TTD benefits from 11/25/05 to a date yet to be determined." The claimant contended that "medical treatment received to date has been reasonable, necessary and related, and that the additional medical treatment being recommended is reasonable, necessary and related."

The respondent contended that "if the claimant did suffer an injury on October 14, 2005, that he was completely recovered from that injury and was released to return to full duty on October 31, 2005, and that any and all appropriate benefits were paid through that date."

The parties agreed to litigate the following issues: "1) Whether the claimant sustained a compensable back injury on 10/14/05. 2) If overcome, whether claimant is entitled to temporary partial disability benefits from 10/14/05 to 11/24/05, and temporary total disability from 11/25/05 to a date yet to be determined, associated medical benefits and attorney's fees. 3) All other issues are reserved."

A hearing was held on September 5, 2006. At that time, the claimant contended that if he could not prove a specific-incident compensable back injury on October 14, 2005, that the alternative issue will be "sustained a gradual onset back injury that manifested itself on October 14, 2005."

The parties agreed to reserve as an issue the claimant's entitlement to temporary partial disability from October 14, 2005 to November 24, 2005.

The administrative law judge found, in pertinent part:

3) The claimant has failed to prove by a preponderance of the evidence that he sustained a compensable specific incident back injury while in the respondents' employ on October 14, 2005.

4) The claimant has proven by a preponderance of the evidence that he sustained a compensable gradual-onset back injury in the form of a large central disc herniation at L4-5 with a large annular tear, while in the respondents' employ.

5) Claimant has proven ...that he is entitled to temporary total disability benefits from November 26, 2005, to a date yet to be determined, plus maximum statutory attorney's fees.

6) The claimant has proven by a preponderance of the evidence that the respondents are responsible for all medical expenses related to the claimant's compensable back injury, including, but not limited to, the treatment now recommended by Dr. Shahim.

The respondent appeals to the Full Commission.

## II. ADJUDICATION

### A. Compensability

Ark. Code Ann. §11-9-102(4) (A) defines "compensable injury":

(i) An accidental injury causing internal or external physical harm to the body ... arising out of and in the course of employment and which requires medical services or results in disability or death. An injury is "accidental" only if it is caused by a specific incident and is identifiable by time and place of occurrence[.]

A compensable injury must be established by medical evidence supported by objective findings. Ark. Code Ann. §11-9-102(4) (D). "Objective findings" are those findings which cannot come under the voluntary control of the patient. Ark. Code Ann. §11-9-102(16).

The claimant's burden of proof shall be a preponderance of the evidence. Ark. Code Ann. §11-9-102(4) (E) (i). Preponderance of the evidence means the evidence having greater weight or convincing force. *Smith v. Magnet Cove Barium Corp.*, 212 Ark. 491, 206 S.W.2d 442 (1947).

In the present matter, the administrative law judge essentially found that the claimant did not prove he sustained an accidental injury pursuant to Ark. Code Ann. §11-9-102(4) (A) (i). The ALJ instead found that the claimant proved, pursuant to Ark. Code Ann. §11-9-102(4) (A) (ii) (b), that the claimant proved he sustained a back injury not caused by a specific incident or identifiable by time and place of occurrence. Although the claimant asks the Full Commission to affirm the ALJ's finding, the claimant has not expressly abandoned his primary contention that the claimant sustained a compensable accidental injury pursuant to Ark. Code Ann. §11-9-102(4) (A) (i). The claimant's theory of a "gradual-onset back injury" was merely an alternate issue

which would arise only if the Commission found that the claimant did not sustain a "specific-incident" injury.

The Full Commission finds that the claimant proved he sustained a compensable injury pursuant to Ark. Code Ann. §11-9-102(4)(A)(i). The record indicates that the claimant began working for Teris L.L.C. in March 2005. The claimant testified that he felt "a pain and a pop" in his back while moving a 55-gallon drum at work on October 14, 2005. The claimant testified that the "pop" happened while he was "rolling the drum" on October 14, 2005. The record does not indicate that this event occurred as a result of "gradual onset." The claimant admitted that he did not immediately report the accident to his supervisor. However, the record demonstrates that the claimant began treating with the company physician on or about October 18, 2005, four days after the specific incident.

The First Report Of Injury Or Illness on October 18, 2005 described an accidental injury, i.e., the "pop" in the claimant's back on October 14, 2005. An MRI performed on December 6, 2005 showed a disc herniation at L4-5. The claimant informed Dr. Shahim in January 2006 that he had sustained a workplace injury on October 14, 2005. Dr. Shahim noted, "I reviewed a lumbar spine MRI. He has a

moderate disc herniation at L4-5." Dr. Shahim again stated in February 2006, "He has a moderate to large disc herniation at L4-5 centrally, causing canal stenosis and lateral recess stenosis more on the right side."

The Full Commission finds that the claimant proved he sustained an accidental injury on October 14, 2005. The accidental injury caused internal physical harm to the claimant's body, arose out of and in the course of the claimant's employment, required medical services, and resulted in disability. The accidental injury was caused by a specific incident on October 14, 2005 and was identifiable by time and place of occurrence. The claimant established a compensable injury by medical evidence supported by objective findings, namely the L4-5 disc herniation as confirmed by Dr. Shahim. The Full Commission therefore affirms the administrative law judge's finding that the claimant proved he sustained a compensable injury.

#### B. Medical Treatment

The 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. Ark. Code Ann. §11-9-508(a). The claimant must prove by a preponderance of the evidence that he is entitled

to requested medical treatment. *Wal-Mart Stores, Inc. v. Brown*, 82 Ark. App. 600, 120 S.W.3d 153 (2003). What constitutes reasonably necessary medical treatment is a question of fact for the Commission. *Dalton v. Allen Eng'g Co.*, 66 Ark. App. 201, 989 S.W.2d 543 (1999).

The administrative law judge found that the respondents were "responsible for all medical expenses related to the claimant's compensable back injury, including, but not limited to, the treatment now recommended by Dr. Shahim." The Full Commission affirms this finding. The claimant has proven that he sustained a compensable injury on October 14, 2005. The record demonstrates that the medical treatment of record provided the claimant after October 14, 2005 was reasonably necessary in connection with the compensable injury. Dr. Shahim eventually performed a lumbar laminectomy. The claimant testified that this surgical procedure afforded him some relief. This probative evidence of post-surgical improvement is a relevant consideration in determining whether surgery was reasonably necessary. *Winslow v. D&B Mech. Contractors*, 69 Ark. App. 285, 13 S.W.3d 180 (2000). Dr. Shahim has recommended additional diagnostic testing related to the claimant's compensable injury. The Full Commission finds that the claimant proved

Dr. Shahim's treatment was reasonably necessary in connection with the claimant's compensable injury.

C. Temporary Disability

Temporary total disability is that period within the healing period in which the claimant suffers a total incapacity to earn wages. *Ark. State Hwy. Dept. v. Breshears*, 272 Ark. 244, 613 S.W.3d 392 (1981). "Healing period" means "that period for healing of an injury resulting from an accident." Ark. Code Ann. §11-9-102(12). Whether or not an employee's healing period has ended is a question of fact for the Commission. *Ketcher Roofing Co. v. Johnson*, 50 Ark. App. 63, 901 S.W.2d 25 (1995).

The administrative law judge found that the claimant proved he was entitled to temporary total disability compensation from November 26, 2005 until a date to be determined. The Full Commission affirms this finding. The claimant sustained a compensable injury on October 14, 2005. Since the Commission has determined that the claimant sustained an L4-5 herniated disc as a result of the compensable injury, we find that the claimant entered a healing period for his injury as of October 14, 2005. The claimant agreed at the hearing that he did not work after November 25, 2005. Dr. Shahim performed surgery on or about

March 6, 2006. Dr. Shahim initially planned to keep the claimant off work for approximately six to eight weeks following surgery. On March 20, 2006, however, Dr. Shahim opined that the claimant's continued symptoms were related to a collapsed disc space as a result of the herniation. Dr. Shahim planned additional diagnostic testing and kept the claimant off work. There is no indication of record that Dr. Shahim expressly returned the claimant to work, nor does the record demonstrate that the claimant's healing period had ended. The claimant testified that he was physically unable to return to work. The decision of the administrative law judge is affirmed.

Based on our *de novo* review of the entire record, the Full Commission finds that the claimant proved he sustained a compensable injury pursuant to Ark. Code Ann. §11-9-102(4)(A)(i). We therefore affirm the administrative law judge's finding that the claimant proved he sustained a compensable injury. The Full Commission affirms the administrative law judge's finding that the claimant proved he was entitled to the medical treatment of record provided after the compensable injury, including all of the treatment from Dr. Shahim. We affirm the administrative law judge's finding that the claimant proved he was entitled to

temporary total disability compensation from November 26, 2005 until a date to be determined.

The claimant's attorney is entitled to fees for legal services pursuant to Ark. Code Ann. §11-9-715(a) (Repl. 2002). For prevailing on appeal to the Full Commission, the claimant's attorney is entitled to an additional fee of five hundred dollars (\$500), pursuant to Ark. Code Ann. §11-9-715(b) (2) (Repl. 2002).

IT IS SO ORDERED.

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OLAN W. REEVES, Chairman

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PHILIP A. HOOD, Commissioner

Commissioner McKinney dissents.

DISSENTING OPINION

I must respectfully dissent from the majority opinion finding that the claimant sustained a compensable injury on October 14, 2005, for which he is entitled to benefits. 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 alleged that he sustained an injury on October 14, 2005, when he was moving a 55 gallon drum off of poly pallet onto a wooden one. According to the claimant, he felt a pop in his back as he was moving the barrel, but "I really didn't think all that much about it" and he continued to work his twelve hour shift. The claimant contends that he advised his co-worker of the incident, but he did not report this alleged incident to his supervisor at that time. October 14, 2005, was a Friday and the claimant was scheduled to be off work the following Saturday, Sunday and Monday. The First Report of Injury or Illness form was introduced into evidence and reveals that the claimant reported the alleged injury on October 18, 2005, when he returned to work on that following Tuesday. According to this form, the claimant reported to work on October 14th at 5:00 a.m. and the alleged injury occurred at 7:00 a.m..

I simply do not find the claimant's account of his alleged injury to be credible. Firstly, the claimant testified that he actually felt a pop in his back but he did not think anything of it. Given the fact that the claimant had been seeking chiropractic care for his

lower back, hip, and leg pains, I do not find it credible that a person in severe and constant pain would "not think" about a pop coming from their back. Secondly, the First Report of Injury or Illness indicates that the alleged injury occurred at 7:00 in the morning, yet the claimant contends that despite have sustained this alleged herniated disc at work, he was able to continue to work ten hours without difficulty, or "thinking about" this pop in his back. Finally, according to the claimant's testimony he allegedly told his co-worker about the pop in his back when it occurred, yet he did not call this co-worker to corroborate his testimony. If in fact the claimant did sustain an injury at work on October 14, 2005, and if in fact he had confided in his co-worker about sustaining this alleged injury, the claimant could have easily called this witness to testify. As it stands, the record consists solely of the claimant's self-serving testimony regarding this alleged work related injury. The claimant allegedly sustained this injury at work on a Friday morning; continued to work all day; was off work the following Saturday, Sunday and Monday; and, conveniently did not report this alleged injury until after his three

days off work. Given the lack of any witnesses to the alleged injury, the three days leave between the alleged injury and the eventually reporting of same, and the claimant's history of back pain in need of chiropractic treatment immediately prior to the alleged injury, I simply do not find that the claimant has proven by a preponderance of the evidence that he sustained a compensable injury for which he is entitled to benefits.

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

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KAREN H. McKINNEY, Commissioner