

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F801261

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| STEPHEN WAYMACK, EMPLOYEE | CLAIMANT |
| TREADWAY ELECTRIC COMPANY, INC., EMPLOYER | RESPONDENT |
| AMERICAN ZURICH INSURANCE CO./ SPECIALTY RISK SERVICE, TPA | RESPONDENT |

OPINION FILED JULY 31, 2009

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

Claimant is not represented by counsel, but appears *pro se*.

Respondent represented by HONORABLE JARROD RUSSEL, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

The claimant appeals from a decision of the Administrative Law Judge filed December 23, 2008.

The Administrative Law Judge entered the following findings of fact and conclusions of law:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The employer/employee/carrier relationship existed on May 23, 2007, and August 7, 2007.
3. The claimant earned an average weekly wage on May 23, 2007, and August 7, 2007, of \$544.00, resulting in an applicable compensation rate of \$363.00 for temporary total disability benefits,

in the event compensability is established.

4. Respondents have controverted this claim in its entirety.

5. Claimant has proven by a preponderance of the evidence that he sustained a temporary aggravation of a pre-existing lumbar back condition as a result of the cross-tie incident on August 7, 2007.

6. Claimant has failed to prove by a preponderance of the evidence that he sustained a compensable low back injury as a result of the automobile accident on May 23, 2007.

7. Claimant has proven by a preponderance of the evidence that the work-related cross-tie incident on August 7, 2007, was the cause for the need for his medical treatment from August 13, 2007, until August 30, 2007.

8. The preponderance of the evidence shows that the claimant failed to give notice of a work-related injury to Treadway prior to the filing of his claim in January of 2008, and therefore respondents are not responsible for disability or medical benefits prior to the receipt of the claimant's report of injury.

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 of fact made by the Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission.

Thus, we affirm and adopt the decision of the Administrative Law Judge, including all findings and conclusions therein, as the decision of the Full Commission on appeal.

IT IS SO ORDERED.

A. WATSON BELL, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Hood dissents.

CONCURRING AND DISSENTING OPINION

After my de novo review of the entire record I concur with the majority opinion that affirming and adopting the Administrative Law Judge's finding that the cross tie incident was a compensable injury, but that the automobile accident was not. However, I must respectfully dissent from the rest of the majority opinion, as I would reverse every other finding of the Administrative Law Judge. I find that the claimant suffered a compensable injury on August 7,

2007, that he gave sufficient notice to his employer, that the treatment he had received through the date of the hearing was reasonable and necessary treatment of his compensable injury and that he was entitled to temporary total disability benefits for the periods August 14 to August 30, 2007, from November 9 to December 26, 2007, and from January 8, 2008 to date.

For the claimant to establish a compensable injury as a result of a specific incident, the following requirements of Ark. Code Ann. §11-9-102(4)(A)(i)(Repl. 2002), must be established: (1) proof by a preponderance of the evidence of an injury arising out of and in the course of employment; (2) proof by a preponderance of the evidence that the injury caused internal or external physical harm to the body which required medical services or resulted in disability or death; (3) medical evidence supported by objective findings, as defined in Ark. Code Ann. §11-9-102(4)(D), establishing the injury; and (4) proof by a preponderance of the evidence that the injury was caused by a specific incident and is identifiable by time and place of occurrence. Mikel v. Engineered Specialty Plastics, 56 Ark. App. 126, 938 S.W.2d 876 (1997).

The claimant alleged two dates of injury, one on

May 23, 2007 when he was in an automobile accident, and one on August 7, 2007 when he was lifting a cross-tie. I find that the record does not support a finding that the automobile accident on May 23, 2007, was compensable.

However, this does not defeat the claimant's entire claim.

The claimant described an incident on August 7, 2007, which precipitated his need for treatment of his right lower back:

Shane Williams asked me if I knew where he could find some cross ties. On the way to a delivery, I had seen that Whit Davis had them. So I called him, and he told me to pick six of them up for him. I grabbed one end of one off the stack, and the other guy went to grab it and just dropped it to the ground. I held it for a second and then dropped it, and it kinda hurt.

His lower right back and hip area hurt. "It felt like I had pulled something in my lower right back." He reported it to Shane Williams, Director of Operations, and Brian Campbell, branch manager for respondent employer. He went to Dr. Storeygard on August 11, 2007.

Brian Campbell testified as to his recollection of the events of August 7, 2007, that the claimant had gone to get a load of cross ties from the lumber company, and that "a guy dropped one end" of a cross tie. The claimant told him that "it twisted or jerked his back or something to that effect." Campbell asked him if he was alright, and the

claimant said he would be alright.

At the hearing, Shane Williams also described the event:

I asked Steve to pick up some cross ties at Ridout. We were actually going to drop them off at our Little Rock store. We were basically going to store conduit on top of them, just to kinda get it off the ground so it wouldn't rust. At that time we had a pickup truck because the van was in the shop, and Steve went to Ridout to pick them up. I don't know if it was that day or the next day or the next week, but he complained the next time I saw him that his back was hurting from picking up the cross ties. I don't know if I asked this at the time, but he complained of his back a lot. Heck, I've been with him when I've hurt my back as far as pulling a muscle or something like that. So I didn't really think much of it because Steve's pretty tough.

Dr. Storeygard's notes from August 13, 2007 indicate that the claimant related that he hurt his back lifting cross ties.

I find that the claimant has proven by the testimony of two representatives of the respondent employer, by his own testimony and the medical records that the cross tie incident occurred in the course and scope of his employment and was a specific incident identifiable by time and place.

Furthermore, the claimant has shown that as a result of the cross tie incident, he required medical treatment for his lower right back, which had been

asymptomatic prior to the cross tie incident, and that the medical evidence was supported by objective findings. The claimant stated that he felt a pull in his back at the time of the incident. On August 13, 2007, the claimant reported to Dr. Storeygard that "now he has irritated his right low back." He related this to lifting a cross-tie a few weeks prior and reported soreness into the right buttock and hip and occasional episodes of pain going down the back of his leg. The lumbar x-ray was within normal limits. Dr. Storeygard assessed low back pain, "most likely due to a lumbosacral strain." If there was radiculopathy, L5-S1 would be the most likely level. The claimant returned on August 20, 2007 to follow up on his lumbar strain with possible radiculopathy. He had improved initially, attempted to return to work, but continued to have problems with his back and some radiation to the right leg and lateral thigh area. Dr. Storeygard assessed lumbar radiculopathy, primarily right-sided. The doctor continued the claimant's prescription, including the muscle relaxant Flexeril, planned physical therapy and kept him off work. Later, Dr. Storeygard noted that the claimant's symptomatology was new, that his lower right back was not symptomatic prior to the cross tie incident. Clearly, the claimant required medical treatment after his injury.

The records are devoid of low right back pain complaints until the August 2007 visit, at which time Flexeril was prescribed as a muscle relaxant. It is reasonable and logical to interpret Dr. Storeygard's note to indicate that Flexeril was necessary for muscle spasm, and thus there are objective findings of injury. Estridge v. Waste Management, 343 Ark. 276, 33 S.W.3d 167 (2000). Furthermore, an MRI of the claimant's lumbar spine, dated August 22, 2007, showed third degree disc degeneration at all levels with mild retrolisthesis of L4 on 5 and L5-S1. The MRI also showed that L2-3 and L3-4 exhibits relative spinal stenosis, or narrowing, due to disc bulging, facet and ligamentous hypertrophy, as well as congenitally short pedicles. These are also objective findings of injury.

The claimant has proven by a preponderance of the evidence that he sustained a specific injury, identifiable by time and place, within the course and scope of his employment, which caused injury requiring medical treatment, supported by objective evidence. Therefore the claimant is entitled to medical and indemnity benefits.

Under Arkansas workers' compensation law, the employer takes the employee as he is found, and circumstances which aggravate preexisting conditions are compensable. Nashville Livestock Commission v. Cox, 302 Ark.

69, 787 S.W. 2d 664 (1990). Employers must promptly provide medical services which are reasonably necessary for treatment of compensable injuries. Ark Code Ann. Sec. 11-9-508(a) (Supp. 2005). Wal-Mart Stores, Inc. v. Brown, 82 Ark. App. 600, 120 S.W.3d 153 (2003). However, injured workers have the burden of proving by a preponderance of the evidence that medical treatment is reasonably necessary for treatment of the compensable injury. Norma Beatty v. Ben Pearson, Inc., Full Commission Opinion filed February 17, 1989 (D612291). What constitutes reasonable and necessary medical treatment is a question of fact for the Commission. Wackenhut Corp. v. Jones, 73 Ark. App. 158, 40 S.W.3d 333 (2001). Further, when the primary injury is shown to have arisen out of and in the course of employment, the employer is responsible for any natural consequence that flows from that injury. Wackenhut, supra. The basic test is whether there is causal connection between the two episodes. Id. A causal connection is established when the compensable injury is found to be "a factor" in the resulting need for medical treatment, even though the compensable injury is not the major cause of the disability or need for treatment. Williams v. L&W Janitorial, Inc., 85 Ark. App. 1, 145 S.W.3d 383 (2004). Postsurgical improvement is a proper

consideration in determining whether surgery was reasonable and necessary. Hill v. Baptist Medical Center, 74 Ark. App. 250, 48 S.W.3d 544 (2001), citing Winslow v. D & B Mechanical Contractors, 69 Ark. App. 285, 13 S.W.3d 180 (2000).

The claimant admittedly had degenerative problems in his back. The medical records show that the claimant did not have low right back pain prior to August 2007, and Dr. Storeygard emphasized this fact in his letter dated April 28, 2008:

I don't think one could attribute all of the degenerative arthritic change in his back seen on that MRI to a single back injury, but lifting a cross-tie can certainly exacerbate lumbar arthritis and spinal stenosis, which had been asymptomatic up to that point.

Dr. Storeygard also stated that if the claimant could "confirm that the lifting of the cross-tie in early August of 2007 occurred as part of his work, then I think we can say that it is work related." Since both the claimant and his supervisors testified that the cross tie incident was work related, and the doctor confirmed that his need for treatment was causally related to the cross-tie incident, the claimant has proven by a preponderance of the evidence that there was a causal connection.

Beginning in August 2007, Dr. Storeygard treated

the claimant's lumbar radiculopathy, with physical therapy, and medications including Flexeril (muscle relaxant), Celebrex (anti-inflammatory), Vicodin (pain reliever), and Medrol Dosepaks (anti-inflammatory). The claimant was off work for ten days. On August 30, 2007, Dr. Storeygard noted that the claimant had experienced some improvement and was on light duty at work. The medication and physical therapy regimen was to continue. In November 2007, the claimant had a flare up of his symptoms, and since that time has been treated for low right back pain, as well as avascular necrosis in his hips, apparently unrelated to his workers' compensation injury. As stated by Dr. Storeygard, the claimant did not have low right back problems until the cross tie incident, which caused a pre-existing but asymptomatic condition to become symptomatic. His treatment expanded to include epidural steroid injections and stronger medications. The brief improvement the claimant experienced did not break the chain of symptoms between the cross tie incident and his current condition. I would award the claimant medical benefits from August 14, 2007 to date, for treatment of his low right back.

Temporary total disability for unscheduled injuries is that period within the healing period in which a claimant suffers a total incapacity to earn wages. Ark.

State Highway & Transportation Dept. v. Breshears, 272 Ark. 244, 613 S.W.2d 392 (1981). The healing period ends when the underlying condition causing the disability has become stable and nothing further in the way of treatment will improve that condition. Mad Butcher, Inc. v. Parker, 4 Ark. App. 124, 628 S.W.2d 582 (1982). The healing period has not ended so long as treatment is administered for the healing and alleviation of the condition. Breshears, supra; J.A. Riggs Tractor Co. v. Etzkorn, 30 Ark. App. 200, 785 S.W.2d 51 (1990). I would award temporary total disability benefits to the claimant from August 14, 2007 through August 30, 2007, from November 9, 2007 to December 26, 2007, and from January 8, 2008 to date, the times during which Dr. Storeygard took him off of work. The claimant's back problems were the given reason for being taken off work. I recognize that the claimant's hip became a treatment focus in June 2008 when avascular necrosis was suggested; however, his lumbar radiculopathy, which developed as a result of the cross tie incident, has been the subject of active treatment since August 14, 2007 and Dr. Storeygard planned a neurological consultation for his lumbar spine after the hip issues were addressed. He has never reached maximum medical improvement for his lower right back issues.

The final issue to be addressed is notice. The

majority has found that the claimant failed to give notice until January 2008. The notice requirement is found at Ark. Code Ann. Sec. 11-9-701:

(a) (1) Unless an injury either renders the employee physically or mentally unable to do so, or is made known to the employer immediately after it occurs, the employee shall report the injury to the employer on a form prescribed or approved by the Workers' Compensation Commission and to a person or at a place specified by the employer, and the employer shall not be responsible for disability, medical, or other benefits prior to receipt of the employee's report of injury.

. . .

(b) (1) Failure to give the notice shall not bar any claim:

(A) If the employer had knowledge of the injury or death;

The claimant testified that he reported that he "felt like I had pulled something in my lower right back" to Shane Williams, Director of Operations, and Brian Campbell, branch manager for respondent employer. Brian Campbell testified that on August 7, 2007, the claimant told him that "a guy dropped one end" of a cross tie which "twisted or jerked his back or something to that effect." Campbell asked him if he was alright, and the claimant said he would be alright. Shane Williams testified that "I don't know if it was that day or the next day or the next week, but he complained the next time I saw him that his back was hurting

from picking up the cross ties." The claimant also testified that he had never had to complete workers' compensation paperwork and that there were no notices about workers' compensation posted at his employment. The evidence is clear that the claimant did indeed tell his supervisors of his injury and that they "didn't really think much of it because Steve's pretty tough," to quote Williams. The claimant did what he was supposed to do. He told his supervisors he injured his back. It was not the responsibility of the claimant to self-diagnose or of the supervisor to diagnose the extent of the injury. He reported it. A Form N should have been provided but was not.

This claim is similar to Swifton v. Shields, 101 Ark. App. 208 (2008) in which the claimant notified employer on the day of the accident but thought that her injury would resolve. Of course it did not. The employer knew she was being treated for problems after the accident, and therefore the notice requirement was filled, regardless of when the AR-N was filed.

The claimant suffered a work-related injury and reported it to his supervisors. Also, Brian Campbell testified that he was aware of at least one doctor's note about restrictions in the fall of 2007. There is no

justification for denying him medical or indemnity benefits. Certainly, the fact that the claimant had ongoing neck problems, that there was "always something ailing him" according to Campbell, was insufficient to disregard the fact that the claimant reported hurting his back on the job and that the branch manager knew he was under active treatment for his back, per the doctor's note.

Interestingly, Williams testified that the claimant complained about his back and sciatic nerve, but the medical records indicate that the claimant only had cervical problems until after the August cross tie incident at which time he did develop lumbar and radicular pain. I find that the notice requirement was satisfied, and that the respondents are responsible for indemnity and medical benefits from the date of the injury forward.

I concur with the majority opinion finding that the cross tie incident was a compensable injury, but that the automobile accident was not. I would reverse every other finding of the majority. I find that the claimant suffered a compensable injury on August 7, 2007, that he gave sufficient notice to his employer, that the treatment he had received through the date of the hearing was reasonable and necessary treatment of his compensable injury and that he was entitled to temporary total disability

benefits for the periods August 14 to August 30, 2007, from November 9 to December 26, 2007, and from January 8, 2008 to date.

For the foregoing reasons, I must respectfully dissent.

PHILIP A. HOOD, Commissioner