

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F311775

DAVID BLACKBURN

CLAIMANT

RANDSTAD NORTH AMERICA, INC.

RESPONDENT

PACIFIC EMPLOYERS INSURANCE COMPANY,  
INSURANCE CARRIER

RESPONDENT

OPINION FILED JULY 21, 2004

Hearing before ADMINISTRATIVE LAW JUDGE MICHAEL L. ELLIG in Fort Smith,  
Sebastian County, Arkansas.

Claimant represented by MATTHEW KETCHAM, Attorney, Fort Smith, Arkansas.

Respondents represented by JAY KUTCHKA, Attorney, Fort Smith, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above styled claim on May 4, 2004, in Fort Smith, Arkansas. A pre-hearing order was entered in this case on March 3, 2004. This pre-hearing order set out the stipulations offered by the parties and outlined the issues to be litigated and resolved at the present time. Prior to the commencement of the hearing, a clarification was made in regard to the date upon which the claimant was contending he began to experience temporary total disability. A copy of the pre-hearing order with this amendment noted thereon, was made Commission's Exhibit No. I to the hearing.

The following stipulations were offered by the parties and are hereby accepted:

1. On July 3, 2003, the relationship of employee-employer-carrier existed between the parties.
2. The appropriate weekly compensation rates are \$165.00 for total disability and \$154.00 for permanent partial disability.
3. On July 3, 2003, the claimant sustained a compensable injury to his lower back.
4. There is no dispute over the payment of medical expenses incurred through August 1, 2003.

5. There is no dispute over temporary total disability benefits accruing through July 24, 2003.

By agreement of the parties, the issues to be litigated and resolved at the present time were limited to the following:

1. The claimant's entitlement to additional medical services and temporary total disability benefits from July 24, 2003 through a date yet to be determined.
2. Appropriate attorney's fees.

In regard to these issues, the claimant contends that his back was injured while lifting a case of bottles while on the property belonging to Hiram Walker while acting within the course and scope of his employment with Randstad North America, Inc. on the date listed.

In regard to these issues, the respondents contend whether or not the claimant is entitled to additional medical treatment and additional temporary total disability benefits.

### DISCUSSION

#### \_\_\_\_\_ I. ADDITIONAL MEDICAL SERVICES

\_\_\_\_\_ The initial issue to be addressed concerns the claimant's entitlement to additional medical services on and after August 1, 2003. These medical services appear to have been rendered the claimant by various physicians and other personnel at a facility known as Accidents, Injuries, and Rehabilitation (AIR). At this facility, the claimant apparently received services from a Dr. Scott Fedosky, a Dr. Randy Conover, a Dr. Brennan Rehling (a chiropractic physician), and various physical therapists.

Clearly, the respondents are liable for the expense of reasonably necessary medical services for the claimant's admittedly compensable back injury, Ark. Code Ann. §11-9-508. However, the burden rests upon the claimant to prove that the disputed medical services actually represent "reasonably necessary medical services" within the meaning of this subsection.

Medical services are “reasonably necessary” when they are necessitated by or are connected with a compensable injury. These medical services must also have a reasonable expectation of accomplishing the purpose or goal for which they are intended.

Reasonably necessary medical services are not limited solely to those medical services intended to improve or resolve the actual physical damage caused by the compensable injury. Other acceptable types of services include those services reasonably necessary to the accurate diagnosis of the nature and extent of the compensable injury, to alleviate or reduce the symptomatic complaints resulting from the compensable injury and to prevent further deterioration or to maintain or stabilize the level of healing achieved.

The medical evidence presented clearly shows that the claimant had significant defects involving his lumbar spine prior to his compensable injury on or about July 3, 2003. These defects consist of degenerative arthritic changes involving the facets of the claimant’s lumbar vertebra at multiple levels, a congenital canal stenosis or narrowing of the spinal canal at multiple levels (greatest at L4-5), and degenerative disc disease with disc bulging at multiple levels (worse at L4-5).

However, the MRI study which revealed the presence of these pre-existing defects, was expressly interpreted by the radiologist as “not eliminating” the possibility of a “subtle” protrusion or herniation at the L4-5 level. Defects in the form of focal disc protrusions or herniations are not generally considered by the medical community as being purely degenerative in nature. Rather, these defects are generally considered to occur as the result of a specific traumatic event, although it might be relatively minor. No further tests have been performed to investigate the possible existence of this type of defect.

The claimant was initially treated by Dr. Terry Clark, a general practitioner, and the respondent’s company physician. His reports indicate that his initial diagnosis of the nature of the claimant’s compensable injury and the cause of the claimant’s lower back and radicular complaints were that of a lumbar strain. Following the MRI study, Dr. Clark added

the additional diagnosis of the existence of the spinal canal stenosis. However, he still maintained the diagnosis of a lumbar strain, as a cause of the claimant's continued lower back complaints.

In his final report (dated August 1, 2003), Dr. Clark notes that the claimant continued to experience the same pain in his lower back (although his radicular symptoms appear to have resolved). He also continues to maintain his diagnosis of the presence of a lumbar strain. Yet, on that date, Dr. Clark effectively terminated his treatment of the claimant for these continuing lower back difficulties. The reason for this action is not entirely clear. Dr. Clark indicates that the claimant should seek the services of his family physician for any further evaluation or treatment of any difficulties that may be attributable to the canal stenosis, which, in his opinion, the canal stenosis "is not a workers' comp injury" (obviously Dr. Clark is unfamiliar with the fact that employment related aggravations of pre-existing conditions can also represent a "workers' comp injury"). Dr. Clark gives no reason for his refusal to provide any further care for the diagnosed lumbar strain.

Following Dr. Clark's actions, the claimant sought further medical services for his continuing lower back difficulties at Accidents, Injuries, and Rehabilitation (AIR). The reports and records of AIR indicate that the claimant received various medical and chiropractic evaluations at this facility. The initial evaluation appears to have been done by Dr. Brennan C. Rehling, a chiropractic physician, on August 1, 2003. At the time of this evaluation, Dr. Rehling notes that the claimant is being evaluated and treated for low back pain, "as ordered by Dr. Clark". The ICD-9 component diagnosis chart (completed at the time of this evaluation) gives a diagnosis as lumbar muscle spasms, lumbar segmental dysfunction, and a lumbar sprain or strain. The records from this evaluation also indicate a diagnosis of the presence of lumbar neuralgia or neuritis, lumbar radiculitis, and acquired curvature of the lumbar spine.

The claimant was next evaluated at AIR by Dr. Scott Fedosky a medical doctor. This evaluation appears to have occurred on August 7, 2003. Dr. Fedosky's narrative report indicates an assessment of back pain, episodic radiculopathy, and clubbing of the claimant's fingers. The physician order/certification of medical necessity that was completed by Dr. Fedosky noted a diagnosis of lumbar spinal stenosis, lumbar muscle spasms, a lumbar sprain/strain, and lumbar neuralgia and neuritis. In his handwritten report of August 7, 2003, Dr. Fedosky gives his opinion concerning the existence of a causal relationship between the claimant's current complaints and difficulties with his lumbar spine and the admittedly compensable injury of July 3, 2003. He states:

"In my opinion patient's congenital canal stenosis probably contributed to but is not the cause of patient's back pain. If it was [the cause], patient should have and would have had back pain earlier in his life and earlier in job career if (the back pain) resulted from a congenital anomaly."

The claimant's testimony which I find to be credible, reflects that he had never experienced any similar or other difficulties with his back or lower extremities prior to his compensable injury on or about July 3, 2003. I find this testimony to be credible and supported by the other evidence presented. The record shows that the claimant had been employed by the respondent for over 2 years prior to July 3, 2003, and that his employment positions required extensive bending, twisting, and turning at the waist and repetitive lifting. For some 18 months to 2 years prior to July 3, 2003, he had performed the exact same activities he was performing at the time of his compensable injury on that date. However, there is no evidence, whatsoever, that prior to July 3, 2003, the claimant had experienced any pain or other difficulties performing these strenuous and back intensive activities. There is no evidence, whatsoever, that the claimant had any restrictions on his physical abilities, voiced any complaints with his lower back, or sought any medical treatment for difficulties involving his lower back, prior to his compensable injury on July 3, 2003.

The claimant testified that his lower back complaints never resolved following his

compensable injury on July 3, 2003. I also find this testimony to be supported by the other evidence presented and credible. Although the claimant's radicular symptoms appear to have resolved during his course of treatment with Dr. Clark, the records and reports of Dr. Clark clearly show the continuous presence of symptoms and complaints involving the claimant's lower back or lumbar spine. Although Dr. Clark released the claimant from his further care "from a workers' comp standpoint", he in no way states that the claimant's compensable injury had resolved. Finally, it must be noted that when the claimant was seen at AIR (on the same day as his release from Dr. Clark), various objective findings, such as muscle spasms were observed. This clearly supports the presence of continuing difficulties with the claimant's lumbar spine.

After consideration of all the evidence presented, it is my opinion that the greater weight of the credible evidence proves that the claimant's continuing symptoms and difficulties with his low back or lumbar spine had their inception in and are causally related to the admittedly compensable injury to this portion of his body on July 3, 2003. Thus, any appropriate medical services necessitated by these continuing complaints are necessitated by and connected with the compensable injury. Thus, the claimant has satisfied the first requirement for these services to constitute "reasonably necessary medical services", under Ark. Code Ann. §11-9-508.

The reports and records of AIR reveal that the services which had been provided to the claimant through this facility for his continuing low back complaints have taken the form of clinical testing and examinations, which were intended to ascertain the nature and extent of the claimant's injury and to monitor his progress. He has also been provided with various conservative treatment modalities (primarily, in the form of chiropractic adjustments and physical therapy), which were intended to improve or resolve the actual physical damage caused by the compensable injury or to, at least, resolve or improve his symptomatic complaints.

The type and duration of these services are in accord with the standard conservative regimens recognized and employed by the general medical community in the evaluation and treatment of back injuries, such as those that have been diagnosed in this case. These reports and records further show that the actual treatment modalities employed have, at least to some extent, been successful in reducing the claimant's low back symptoms and complaints.

Thus, I find that the medical services provided to the claimant for his compensable low back injury, on and after August 1, 2003, by the personnel at AIR had a reasonable expectation of accomplishing the purpose for which they were intended. This satisfies the second requirement for these services to constitute "reasonably necessary medical services", under Ark. Code Ann. §11-9-508.

Although not expressly stated as an issue, it appears that the respondents may be attempting to argue that these medical services are "unauthorized" medical services, under Ark. Code Ann. §11-9-514. Thus, the respondents should not be held liable for the expense of such services. However, I do not agree.

As previously noted, Dr. Clark effectively refused to provide the claimant with any further medical services on August 1, 2003. At that time, he was not only the claimant's only authorized treating physician, but he was also the respondent's company physician. In this latter capacity, as a quasi agent of the respondent, his compensable back injury could be reasonably inferred to constitute a refusal by the respondent to provide any further medical services. This inference is further bolstered by the fact that after the respondents became aware that Dr. Clark had discharged the claimant from any further treatment, the respondents made no attempt to authorize or in any way provide the claimant with access to further medical services for his compensable injury by any other physician. It is clear that when a respondent fails to provide appropriate medical services for a compensable injury, the claimant may seek such services from any provider of his

choosing. If such medical services are subsequently found by this Commission to be “reasonably necessary” for the compensable injury, the respondents are liable for the expense of these services.

It further appears from the evidence presented that when Dr. Clark released the claimant from his further care, he effectively “referred” the claimant for any further medical treatment for all of his continuing back complaints by any physician of the claimant’s choosing. Although Dr. Clark expressly states (in his report of August 1, 2003), that he is referring the claimant to the claimant’s family physician, he did not bother to inquire if the claimant actually had a “family physician”. In his testimony the claimant indicates that he did not, in fact, have such a “family physician”. I would also note that the claimant in no way sought or requested this referral. It must be noted the respondents were aware of this non-specific “referral” by their company physician. Yet, the respondents made no attempt to in any way limit this open ended “referral”.

Thus, I find that when the claimant sought medical services for his continuing back symptoms from AIR, this represented a bona fide referral from an authorized treating physician, Dr. Clark. It is well recognized that medical providers in a bona fide chain of referral from an authorized treating physician are also “authorized” under Ark. Code Ann. §11-9-514.

For the foregoing reasons, I find that the services provided to the claimant for his compensable low back injury by the various medical personnel at AIR does not constitute “unauthorized” medical services within the meaning of Ark. Code Ann. §11-9-514. Therefore, the respondents cannot escape liability for the expense of such services under the provisions of this subsection.

I would also note that the reports and records from AIR indicate that the claimant may also have received medical services from this facility for complaints involving his neck, upper back, and upper extremity. There has been no compensable injury established to

these portions of the claimant's anatomy. Thus, the claimant has failed to prove that these medical services were necessitated by or causally related to a "compensable injury" as required by Ark. Code Ann. §11-9-508. The expense of these services is found not to be the liability of the respondents herein.

In summary, I find that the medical services provided the claimant by personnel at AIR on and after August 1, 2003, for his continued lower back complaints constitute reasonably necessary medical services under Ark. Code Ann. §11-9-508. I further find that these medical services do not represent "unauthorized" medical services within the meaning of Ark. Code Ann. §11-9-514. Finally, I find that the claimant has failed to prove that any medical services provided him for any complaints or difficulties with his neck, upper back, and upper extremity constitutes reasonably necessary medical services for his compensable low back injury. Thus, the respondents are liable only for the expense of medical services provided the claimant by personnel at AIR for his lower back and radicular complaints, on and after August 1, 2003. Liability for these expenses is subject to the medical fee schedule established by this Commission.

## II. TEMPORARY TOTAL DISABILITY

The second issue concerns the claimant's entitlement to temporary total disability benefits from July 24, 2003, through a date yet to be determined. The burden again rests upon the claimant to prove his entitlement to these benefits. In order to meet this burden, the claimant must prove by the greater weight of the credible evidence that he continued within his healing period from the effects of his compensable lower back injury and was also rendered totally disabled from regular gainful employment as a result of the effects of this compensable injury.

The matter of the duration of the healing period is a medical question, which must be resolved upon the basis of the greater weight of the medical evidence presented. The healing period ends when the claimant achieves the maximum benefit of time and medical

treatment in regard to the healing of the actual physical damage caused by the compensable injury. Once this underlying physical damage resolves or at least stabilizes, at a level where nothing further in the way of time or medical treatment offers a reasonable expectation of improvement, then the healing period has ended. The mere continuation of symptoms and complaints is not sufficient in and of itself, to extend the period.

Although Dr. Clark discharged or released the claimant from his treatment on August 1, 2003, he in no way states that the claimant's compensable injury has healed or even that further medical services are unnecessary. Dr. Clark clearly notes the claimant's continuing low back symptoms and complaints. These are the exact same symptoms and complaints that had been present since the claimant's initial visit. Dr. Clark's diagnosis was also essentially the same. The only thing that apparently changed was Dr. Clark's willingness to provide further testing or treatment, which appears to be based upon his conclusion that these complaints were no longer a "worker's comp" problem. This conclusion is not supported by the greater weight of the evidence.

The claimant immediately began to receive active medical treatment for his lower back difficulties at AIR. This active treatment continued through at least October 17, 2003.

In the present case, the medical evidence does not show the claimant received any medical treatment for his compensable injury after October 17, 2003. Thus, it is impossible to determine whether or not he continued within his healing period after that date. However, the medical evidence does show that the claimant was under constant active medical treatment for his compensable injury through October 17, 2003. Thus, in regard to this period of time, the claimant has proven the first requirement for his entitlement to temporary total disability benefits.

In regard to actual disability, the evidence shows that the respondent provided the claimant with light or sedentary employment, (within the restrictions imposed by Dr. Clark) though July 24, 2003. On that date, the claimant was seen by Dr. Clark who continued his

release to only light duty with the restrictions of no lifting over 20 pounds and no repetitive back motion. The claimant testified that on that date he was informed by the respondent that it had no employment available within his restrictions. A somewhat curious position, in light of the fact that the respondent had been providing him with light duty employment that met with these same restrictions. It is also curious that only one week later the claimant is discharged by Dr. Clark.

When the claimant was released by Dr. Clark “from a workers’ comp” standpoint (on August 1, 2003), there was no mention made by Dr. Clark in regard to physical restrictions. However, when the claimant consulted the physicians at AIR, on that same date, restrictions were imposed on his potential employment activities that prohibited lifting more than 15 pounds, repetitive bending or twisting, and prolonged standing or walking (essentially the same restrictions as previously imposed by Dr. Clark). The claimant was also required to undergo periodic physical therapy and chiropractic manipulations, which would also interfere with his actual availability for employment.

I find that the physical restrictions produced by the claimant’s compensable injury together with his continuing symptoms and ongoing medical treatment would preclude any reasonable expectation of his obtaining regular gainful employment in the open job market for the period beginning July 25, 2003, and continuing through at least October 17, 2003. Thus, he has satisfied the second requirement for his entitlement to temporary total disability benefits during this period.

In summary, it is my opinion that the claimant has proven by the greater weight of the credible evidence that he continued within his healing period from the effects of his compensable low back injury and continued to be rendered totally disabled as a result of the effects of this compensable injury for the period of July 25, 2003 through at least October 17, 2003. Therefore, he would be entitled to temporary total disability benefits during this period.

## FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On July 3, 2003, the relationship of employee-employer-carrier existed between the parties.
3. On July 3, 2003, the claimant earned wages sufficient to entitle him to weekly compensation benefits of \$165.00 for total disability and \$154.00 for permanent partial disability.
4. On July 3, 2003, the claimant sustained a compensable injury to his lower back.
5. There is no dispute over the payment of medical expenses incurred for services provided by Dr. Clark through August 1, 2003.
6. The medical services rendered to the claimant for his low back and radicular difficulties by and at the direction of personnel at Accidents, Injuries, and Rehabilitation (AIR) constitute "reasonably necessary medical services" for the claimant's compensable low back injury under Ark. Code Ann. §11-9-508. These medical services were necessitated by or connected with the claimant's compensable injury and had a reasonable expectation of accomplishing the purpose for which they were intended.
7. The medical services provided to the claimant for his compensable low back injury by and at the direction of the personnel at Accidents, Injuries, and Rehabilitation (AIR) does not constitute "unauthorized" medical services, under the provisions of Ark. Code Ann. §11-9-514. Specifically, these services were obtained as the result of a referral by the claimant's "authorized" treating physician. These services were also obtained after the refusal of this physician (who was also the company doctor), to provide the

claimant with any further medical services for his compensable injury, and after the respondents failed to authorize the claimant to receive any such services from any other physician.

8. The claimant has been rendered temporarily disabled as a result of the effects of his compensable low back injury for the period beginning July 25, 2003 and continuing at least through October 17, 2003. During this time, he continued within his healing period from the effects of his compensable low back injury and was also rendered totally disabled from performing regular gainful employment as a result of this injury.
9. The respondents have controverted the claimant's entitlement to any medical services after his "release" by Dr. Clark on August 1, 2003. The respondents have also controverted the claimant's entitlement to any temporary total disability benefits.
10. A reasonable fee for the claimant's attorney is the maximum statutory attorney's fee on the controverted temporary total disability benefits herein awarded.

#### ORDER

The respondents shall pay to the claimant temporary total disability benefits for the period beginning July 25, 2003, and continuing through October 17, 2003.

The respondents shall be liable for the expense incurred by the claimant as a result of medical services provided him by personnel at AIR for his compensable low back injury. This liability shall be subject to the medical fee schedule established by this Commission. The respondents shall not be liable for the expense of any medical services provided to the claimant by personnel at AIR for complaints involving his upper back, neck, and upper extremity.

The respondents shall pay to the claimant's attorney the maximum statutory attorney's fee on the controverted temporary total disability benefits herein awarded . One-half of this fee is the obligation of the respondents in addition to such benefits. The remaining one-half of this fee is to be withheld by the respondents from such benefits.

All benefits herein awarded, have heretofore accrued and are payable in a lump sum without discount.

This award shall bear the maximum legal rate of interest until paid.

IT IS SO ORDERED.

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MICHAEL L. ELLIG  
Administrative Law Judge