

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F201235

LARRY CONNER

CLAIMANT

BLACK DIAMOND EXPRESS

RESPONDENT

COMMERCE & INDUSTRY,  
INSURANCE CARRIER

RESPONDENT

OPINION FILED AUGUST 31, 2004

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

Claimant represented by EDDIE WALKER, JR., Attorney, Fort Smith, Arkansas.

Respondents represented by CAROL WORLEY, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above styled claim on June 22, 2004, in Fort Smith, Arkansas. A pre-hearing order was entered in this case on February 25, 2004. The pre-hearing order purported to 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, certain changes were made in the pre-hearing order. The exact amount of the weekly compensation rates for total and permanent partial disability were agreed upon, the claimant amended the second issue to reflect that he was only requesting additional temporary partial disability benefits from January 14, 2004 through a date yet to be determined (rather than temporary total disability benefits. The claimant also requested that, without objection, the issue of his entitlement to permanent disability benefits be withdrawn at the present time. A copy of this pre-hearing order with those amendments noted thereon, was made Commission' Exhibit No. 1 to the hearing.

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

1. On all relevant dates, including January 27, 2002, the relationship of employee-employer-carrier existed between the parties.
2. The appropriate weekly compensation rates are \$327.00 for total disability and \$245.00 for permanent partial disability.

3. On January 27, 2002, the claimant sustained a compensable injury to his back.
4. There is no dispute over the payment of medical expenses incurred to date.
5. There is no dispute over the payment of temporary total disability benefits through January 13, 2004.
6. The respondents have accepted liability for permanent partial disability to a permanent physical impairment of 13% to the body as a whole, with such benefits commencing on January 14, 2004.

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, at the respondents' expense, specifically surgical treatment recommended by Dr. Clio Robertson.
2. The claimant's entitlement to additional temporary partial disability benefits from January 14, 2004 through a date yet to be determined.
3. Appropriate attorney's fees.

In regard to these issues, the claimant contends:

"The claimant contends that he is entitled to additional medical treatment and reinstatement of his temporary partial disability benefits from the date last paid until a date yet to be determined.

The claimant contends that his attorney is entitled to an appropriate attorney's fee."

In regard to these issues, the respondents contend:

"Respondents contend that the claimant was released to return to work on 5/10/02 as having maximum medical improvement. There are no restrictions or limitations in his activities. Respondents contend the medical documentation does not indicate a need or entitlement to additional temporary disability benefits. Further, respondents contend that medical treatment has not been discontinued with regard to claimant's authorized treating physicians."

## DISCUSSION

### I. ADDITIONAL MEDICAL SERVICES

Clearly, the claimant is entitled to all reasonably necessary medical services for his compensable injury, Ark. Code Ann. §11-9-508. However, the claimant must still prove, by the greater weight of the evidence, that the medical services in dispute actually represent “reasonably necessary medical services,” under this subsection.

Medical services are “reasonably necessary” when they are necessitated by or connected with the compensable injury and have a reasonable expectation of accomplishing the purpose or goal for which they are intended. The term “reasonably necessary” is not limited to those medical services directed toward the actual treatment of the physical damage occasioned by the compensable injury. Medical services may be reasonably necessary even if their sole purpose is only to determine the nature and extent of the claimant’s injury, to formulate a program of treatment, to maintain the level of healing achieved, or to simply provide the claimant with mere symptomatic relief of chronic symptoms.

In the present case, the claimant testified that he has continued to experience rather severe symptoms and has continued to experience significant limitations, all as a result of his admittedly compensable back injury. The medical evidence shows that the claimant has been under constant treatment for his compensable injury through at least March of 2004. The claimant’s prior medical treatment initially consisted of conservative modalities (in the form of medication and physical therapy), but ultimately required surgical intervention (in the form of a discectomy and double level fusion involving the L4-5 and L5-S1 intervertebral joints). The claimant’s primary treating physician for his compensable injury has been Dr. Clio Robertson. Dr. Robertson is an orthopaedic surgeon. He is also the physician who performed the lumbar discectomies and fusions. The stipulations made by the parties reflect that all of these medical services provided by Dr. Robertson have been voluntarily paid by the respondents. Thus, Dr. Robertson is the claimant’s authorized physician.

The dispute arises over additional medical services recommended by Dr. Robertson. These medical services take the form of a surgical re-exploration of the L5-S1 fusion site with the removal of screws and hardware surgically implanted during the prior fusion and a possible repeat fusion of the L5 vertebra to the S1 vertebra. Thus, it would appear that this recommended second surgical procedure would be both for diagnostic and possibly corrective purposes.

Dr. Robertson's recommendation of this second surgery is based on his expert opinion that there has been an incomplete fusion or pseudoarthrosis between the L5-S1 vertebrae (he also opines that the claimant has had a good result or complete fusion between the L4-L5 vertebrae). This opinion is supported by his interpretation of repeated x-ray studies (on which he observes abnormalities involving the fusion site and hardware at L5-S1), abnormalities noted on his repeated physical examinations, and the claimant's continuing symptoms and complaints. His opinion in regard to these matters is adequately summarized in his March 3, 2004 office note:

"It is still my opinion that he (the claimant) may have a pseudoarthrosis but certainly has evidence of motion of the pedicle screw within the pedical of the first sacral vertebra. Therefore, I still feel it would be advisable to remove the internal fixation and explore the fusion, and I have so discussed with him. "

In contradiction of the expert medical opinion of Dr. Robertson, the respondents have offered the expert medical opinion of Dr. Stephen Eichert. Dr. Eichert's stationary reflects that he is a doctor of osteopathy with his practice limited to neurosurgery. In his report of December 23, 2003, Dr. Eichert expresses the opinion that the claimant has achieved MMI (maximum medical improvement) and that no further surgery is "indicated." He bases this opinion on his one time evaluation of the claimant (on December 5, 2003) and his review of x-ray studies, purported by those performed by Dr. Robertson on December 10, 2003. He states that these x-rays show "that the segmental fixation is in optimal position", but he does acknowledge the appearance of some "dissolution of the graft laterally at L5, S1." However, he feels that such "dissolution" is not "a significant problem," because the claimant has a "stable position of the PLIF (stabilizing hardware)." Finally, he states he does not see any evidence on this x-ray of "backing out of the hardware"(i.e.

the screws).

I am unfamiliar with both of these physicians and have no personal knowledge of their credentials or level of expertise. From their stationary, they both appear to be specialists in the area of medicine associated with the compensable injury. However, their expert medical opinions are clearly diametrically opposed in regard to two major factors, whether some of the claimant's hardware has become unstable and whether surgical intervention is medically necessary. Both of these physicians appear to agree that the actual bone fusion of the L5-S1 vertebrae has not been entirely successful.

Under the circumstances in this case, I am inclined to accept the expert medical opinion of Dr. Robertson. Dr. Robertson is, in fact, the claimant's primary authorized treating physician. He has had far more opportunities to examine and evaluate the claimant and his condition, than Dr. Eichert. He has also had the opportunity to examine the claimant and review x-rays that were taken after Dr. Eichert wrote his report of December 23, 2003. I would also note that the surgical procedure recommended by Dr. Robertson is diagnostic, as well as therapeutic. If, his recommended surgery shows (as Dr. Eichert believes) that the claimant's internal hardware and fusion is stable, then the expense of this surgical intervention should be relatively minor.

It is therefore my opinion that the claimant has proven by the greater weight of the credible evidence that the surgical exploration of the fusion site at L5-S1, as recommended by Dr. Robertson, represents "reasonably necessary medical services" for his compensable injury, as that term is used in Ark. Code Ann. §11-9-508. Pursuant to the provisions of this subsection, the respondents are liable for the expense of this recommended medical service, subject to the medical fee schedule established by this Commission.

## II. ADDITIONAL TEMPORARY PARTIAL DISABILITY BENEFITS

In order to be entitled to the additional temporary partial disability benefits he now seeks, the claimant must prove two facts by the greater weight of the credible evidence. First, he must show that he has continued within his healing period from the effects of his compensable injury.

Secondly, he must show that he has experienced an actual reduction or decrease in his wages, or wage earning capacity as a result of his compensable injury.

The duration of the healing period is a medical question, which must be resolved on the basis of the greater weight of the medical evidence presented. The healing period continues until the claimant has achieved the maximum benefit of time and medical treatment in regard to the healing or stabilization of the underlying physical damage caused by his compensable injury. Once the underlying physical damage becomes fixed, permanent, and ascertainable, then the healing period has ended.

As previously noted, the expert medical opinions on the duration of the claimant's healing period are diametrically opposed. The reports and records of Dr. Robertson show, that in his opinion, the claimant has not achieved the maximum benefit of time and medical treatment in the resolution or stabilization of the actual physical damage caused by his compensable injury. On the other hand, Dr. Eichert opined that the claimant has reached MMI (maximum medical improvement). This would imply that, in Dr. Eichert's opinion, the claimant had achieved the maximum benefit of time and medical treatment in the resolution or stabilization of the physical damage caused by his compensable injury. Dr. Eichert's assessment of a percentage of permanent physical impairment would further imply that, in his opinion, the remaining physical damage caused by the claimant's compensable injury had become fixed, permanent, and ascertainable.

For the same reasons heretofore set forth, I find that the expert medical opinion of Dr. Robertson is entitled to the greater weight and credit. Therefore, the claimant has proven by the greater weight of the credible medical evidence that he has continued within his healing period from the effects of the compensable injury from January 14, 2004 through a date yet to be determined. Thus, he has proven the first fact necessary for his entitlement to temporary partial disability benefits.

In regard to the issue of actual partial disability or reduction in wages, Dr. Robertson has released the claimant to return to truck driving, both only for short distances and only up to 5

hours at a time. Clearly, the claimant could also perform other employments for this 5 hour period, which did not place undue stress or trauma on his lumbar spine (i.e. no repetitive bending or twisting at the waist, heavy or repeated lifting, prolonged standing, or prolonged sitting over 4 to 5 hours).

Donald Larry Provence, the owner of the respondent employer, testified that he might have had some short haul jobs, within a couple of months of the claimant's surgery. There is no evidence that, when these jobs were available, that any of these positions were offered to the claimant. Finally, Mr. Provence stated that he had nothing available at the present time that would allow the claimant to work only 4 to 5 hours at a time.

The claimant testified that from January of 2004 to the middle of April of 2004, he drove a wrecker for a wrecker service and hauled gravel in a "bobtail" truck. He further testified that during this period he normally worked 10 to 38 hours a week with a 42 hour week on one occasion. He stated that he believed that he was physically capable of performing limited work, if he could find a suitable position. Since April of 2004, he has simply done things around his house and "repaired" things, but has earned no money for any of these activities.

After consideration of the evidence, I find that the claimant has also proven the greater weight of the credible evidence that his compensable injury has caused a temporary decrease in his average weekly wage or wage earning capacity. Thus, the claimant has proven the second fact necessary for his entitlement to temporary partial disability benefits.

I further find that the claimant's wage earning capacity during this period would be accurately reflected by the average weekly wage he received for driving the gravel truck. The claimant's average weekly wage for this employment is computed by taking the average number of hours he worked per week, as reflected by his testimony, and multiplying this number of hours by the hourly wage he was paid. The claimant testified that he worked between 10 and 38 hours per week, while driving the gravel truck and was paid at the hourly rate of \$8.00. Thus, the average hours worked per week would be in the neighborhood of 24 and his hourly wage was \$8.00. This

would yield an average weekly wage of \$192.00.

The average weekly wages he earned for the respondent, at the time of his compensable injury, can be calculated from his stipulated total disability rate of \$327.00. When this rate is multiplied by 3/2, it yields an average weekly wage of \$490.50. When his current wage earning capacity of \$192.00 is subtracted from his average weekly wage of \$490.50, the difference or reduction of the claimant's average weekly wage, as a result of his temporary partial disability, would be \$298.50. This would yield an appropriate weekly compensation rate for temporary partial disability of \$199.00.

Therefore, for the period beginning January 14, 2004 and continuing until a date yet to be determined, the claimant would be entitled to temporary partial disability benefits at the weekly rate of \$199.00.

#### FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On January 27, 2002, the relationship of employee-employer-carrier existed between the parties.
3. On January 27, 2002, the claimant earned an average weekly wage of \$490.50, which would entitle him to weekly total disability benefits of \$327.00 and weekly permanent partial disability benefits of \$245.00.
4. On January 27, 2002, the claimant sustained a compensable injury to his lower back.
5. There is no dispute over the payment of medical expenses incurred through the date of the prehearing.
6. The claimant has proven by the greater weight of the credible evidence that the additional medical services recommended by Dr. R. Clio Robertson, in the form of a surgical exploration and correction of the fusion at L5-S1, constitutes reasonably necessary medical services for his compensable injury. Pursuant to Ark. Code Ann. §11-9-508, the respondents are liable for the expense of these services, subject to

the medical fee schedule established by this Commission.

7. There is no dispute over the claimant's entitlement to temporary disability benefits accruing prior to January 14, 2004, and all such appropriate benefits have been paid by the respondents.
8. The claimant has been rendered temporarily partially disabled as a result of his compensable injury, within the meaning of Ark. Code Ann. §11-9-520 and for the period beginning January 14, 2004, and continuing until a date yet to be determined. The appropriate weekly compensation rate for such temporary partial disability benefits is \$199.00.
9. The respondents have controverted the claimant's entitlement to the additional medical services recommended by Dr. Robertson and his entitlement to any temporary disability benefits after January 13, 2004 (partial or total).
10. A reasonable fee for the claimant's attorney is the maximum statutory attorney's fee on the temporary partial disability benefits herein awarded and any additional temporary total disability benefits to which the claimant may become subsequently entitled during his recovery period from the recommended surgery.

#### ORDER

The respondents shall pay to the claimant temporary partial disability benefits at the weekly rate of \$199.00 for the period beginning January 14, 2004 and continuing through a date yet to be determined.

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

The respondents are liable for the expense of the surgical procedure recommended by Dr. Robertson. This liability is subject to the medical fee schedule established by this Commission.

All benefits herein awarded, which have heretofore accrued, 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