

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F204535

CURTIS GARDNER

CLAIMANT

BEVERLY ENTERPRISES

RESPONDENT

CONSTITUTION STATES INSURANCE COMPANY,
INSURANCE CARRIER

RESPONDENT

OPINION FILED OCTOBER 27, 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 J. LESLIE EVITTS, III, Attorney, Fort Smith, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above styled claim on August 17, 2004, in Fort Smith, Arkansas. The deposition of the claimant was taken on July 12, 2004, and has been admitted as Respondents's Exhibit No. 3. The deposition of David Christopher Hampton was taken on September 10, 2004, and has been admitted subsequent to the hearing as Respondents' Exhibit No. 4.

A pre-hearing order was entered in this case on June 30, 2004. This pre-hearing order set out the stipulations offered by the parties and outlined the issues to be litigated and resolved at this time. A copy of the pre-hearing order was made Commission's Exhibit No. 1 to the hearing.

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

1. On February 21, 2002, the relationship of employee-employer-carrier existed between the parties.
2. The appropriate weekly compensation rates are \$425.00 for total disability and \$319.00 for permanent partial disability.
3. On February 21, 2002, the claimant sustained a compensable injury to his back.
4. There is no dispute over the payment of medical expenses which were incurred through May 30, 2002.
5. There is no dispute over the payment of temporary disability benefits.

6. The claimant's healing period ended on or before July 8, 2002.
7. The respondents have accepted liability for and have paid permanent partial disability benefits for a 10% permanent physical impairment.

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

1. The existence and extent of permanent functional disability.
2. Appropriate attorney's fees.
3. Liability for expenses incurred for medical services provided the claimant by and at the direction of Dr. Charles Jennings.

In regard to these issues, the claimant contends:

- (a) The claimant contends that he is entitled to wage loss disability in an amount to be determined by the Commission.
- (b) The claimant will contend that any permanent partial disability benefits not previously paid have been controverted and that the claimant's attorney is entitled to an appropriate attorney's fee.

In regard to these issues, the respondents contend:

"Respondents contend that claimant has been paid all benefits due and owing with regard to the compensable injury and that the claimant is not entitled to wage loss."

DISCUSSION

The first issue to be addressed concerns the claimant's entitlement to the payment of expenses incurred as the result of medical services rendered him by and at the direction of Dr. Charles Jennings, his family physician. Clearly, the claimant is entitled to all reasonably necessary medical services for his compensable injury at the respondents' expense, Ark. Code Ann. § 11-9-508. The mere fact that the claimant has reached the end of his "healing period" and has received a rating for permanent physical impairment does not automatically terminate the respondents' liability for appropriate medical services. The Act clearly recognizes that the term "reasonably necessary medical services" extend to those services intended merely to maintain the level of healing achieved, to treat periodic exacerbations of symptoms, and to provide relief from long

term chronic symptoms. The Act further recognizes that these services may be required indefinitely and long after the actual “healing period” of the compensable injury has ended. In fact, the Act provides that the claimant may continue to be entitled to such services, at the respondents’ expense, even after the statute of limitations has expired, Ark. Code Ann. §11-9-702(b)(2).

However, the burden still rests upon the claimant to prove that the disputed medical services of Dr. Jennings represent “reasonably necessary medical services” for his compensable injury. In order to constitute “reasonably necessary medical services” medical services must be necessitated by or connected with the compensable injury and have a reasonable expectation of accomplishing the purpose or goal for which they are intended.

According to the claimant’s testimony, the disputed medical expenses involve a single visit to Dr. Jennings (in December of 2003), and prescription medications provided him at the direction of Dr. Jennings for the chronic low back complaints he has continued to experience. Again, according to the claimant’s testimony, the medication prescribed by Dr. Jennings was the same medication that had previously been prescribed for these complaints by Dr. Armstrong. The claimant testified that the medication he required was for chronic muscle spasms in his lower back and buttock. He further testified that the medication given him for these difficulties provided him with significant relief.

In his deposition and testimony at the hearing, the claimant explained how he came about seeing Dr. Jennings for this medication. He stated that “for quite a while, months and months” after his last visit with Dr. Armstrong (on June 10, 2002), Dr. Armstrong continued to refill his prescription medication. Finally, he was advised by Dr. Armstrong that he needed to have his medication handled by a “regular doctor,” such as Dr. Holder. Dr. Holder is a general practitioner and was one of the claimant’s initial treating physicians. The claimant testified that he then contacted Dr. Holder’s office and was advised by Dr. Holder’s office to obtain these services from his family physician. Thus, he consulted Dr. Jennings.

While I find the claimant's testimony, in regard to this matter, to be credible, it would certainly be helpful to have had some report or record from Dr. Jennings setting out the exact type and nature of services he provided the claimant in December of 2003. It would also have been helpful to have had some evidence to identify the specific medication involved. Finally, it would have been helpful to have had some type of medical evidence to indicate that such medication continued to be medically appropriate for the claimant's continuing difficulties.

The last medical reports or records introduced was the narrative report of Dr. Armstrong dated July 8, 2002. I would note that, in this report, Dr. Armstrong clearly recognizes the likelihood that the claimant will continue to have muscle spasms throughout the lumbosacral region for an indefinite period of time. Such chronic symptoms are not unreasonable or unlikely in light of the type and nature of the permanent injury experienced by the claimant.

I would also note that the claimant's credible testimony shows that he attempted to obtain his replacement medication through his previously authorized treating physicians. Even after consulting Dr. Jennings, he has attempted to obtain authorization from the respondent for follow up care to obtain this replacement medication, from a physician of their choosing. However, the respondents have declined to authorize or accept liability for any follow up care by any physician. In light of the clear medical evidence, indicating that such periodic and minimal follow up care will likely be indefinitely required for the claimant's permanent injury, the respondents' position appears somewhat unreasonable.

After consideration of all the evidence presented, I find that the claimant has proven by the greater weight of the credible evidence that the medical services he obtained from Dr. Jennings (i.e. the replacement of his long term medication for relief of muscle spasms and the medication itself), is reasonably necessary medical services for his compensable injuries. Pursuant to Ark. Code Ann. §11-9-508, the expense of such services (subject to the medical fee schedule established by this Commission), is the liability of the respondents herein.

I further find that these services do not represent "unauthorized" treatment under Ark.

Code Ann. §11-9-514. These services were obtained as the result of a bona fide referral from an authorized treating physician, Dr. Holder.

The central issue in this case is the question of the claimant's entitlement to permanent partial disability benefits for permanent functional disability or loss of wage earning capacity due to his compensable injury. Clearly, the claimant's compensable injury is to a portion of his body that is considered "unscheduled" by the Act. Thus, his entitlement to permanent partial disability benefits is controlled by the provisions of Ark. Code Ann. §11-9-522.

The evidence shows that, immediately following the claimant's initial release to return to work, the respondents provided him with suitable employment at wages equal to or greater than those he was receiving at the time of his compensable injury. Thus, at that time he would not have been entitled to any benefits for permanent functional disability or loss of wage earning capacity, Ark. Code Ann. §11-09-522(b)(2). However, subdivision (d) of this subsection provides that the claimant may raise issue of his entitlement to permanent functional disability benefits should his employment situation change. The evidence shows that in November of 2002, the claimant's employment was terminated by the respondent. There is no evidence that this termination was in any way due to misconduct on the part of the claimant, but was due simply to a reduction by the respondent in its work force. Thus, at that time, the claimant would become entitled to a determination of his entitlement to permanent functional disability and would not be barred from receiving benefits for such disability by the provisions of subdivision (c)(2) of this subsection.

The claimant's testimony shows that upon his termination by the respondent, he attempted to find work elsewhere. He stated that he has been able to find, at least, limited employment since that time. However, these employment positions have been at substantially less wages than he was earning at the time of his compensable injury.

The respondents have presented evidence, which shows that there are employment positions available in the computer field that is within the claimant's physical limitations. Although this evidence is relevant in determining the extent of the claimant's loss of wage earning capacity,

it falls far short of constituting a “bona fide offer” of suitable employment that would be at wages equal to or greater than the claimant was earning at the time of his compensable injury. Thus, this evidence is simply not sufficient to invoke the provisions of subdivision (c) (1) of Ark. Code Ann. §11-9-522.

The medical evidence shows that on June 10, 2003, Dr. Larry Armstrong (a neurosurgeon and the claimant’s primary treating physician) released the claimant to return to work with no restrictions. In his testimony, the claimant refutes Dr. Armstrong’s statement that the compensable injury has resulted in no restrictions on his physical activities. The claimant testified that, since his compensable injury and resulting surgery, he has been unable to bend, stoop, or crawl for any period of time without any increased difficulties, and is unable to lift or hold more than 15 to 20 pounds, particularly if he would lift or hold such objects out in front of him.

The medical evidence reveals that only a week prior to his report of June 10, 2002, Dr. Armstrong placed medical restrictions on the claimant from engaging in any physical activities requiring bending, stooping, or lifting more than 5 pounds and any “strenuous” activity. The medical evidence further shows that the claimant’s compensable injury was in the form of a large herniated disc on the right at the L5-S1 level. This defect required surgical intervention in the form of a right microlaminectomy and medial facetectomy, with a lateral release decompression, a foraminotomy and the excision of the herniated disc on April 12, 2003.

This is the first instance where I have seen no permanent medical restrictions placed upon an individual that has experienced this type of injury and undergone this type of surgical intervention. The standard permanent medical restrictions for this type of injury, with resulting surgical intervention, are normally no repetitive or prolonged bending or twisting at the waist, no repetitive or prolonged stooping, no prolonged standing or sitting, no repetitive lifting over 10 pounds and no lifting whatsoever, over anywhere between 30 and 50 pounds.

After consideration of all the evidence presented, it is my opinion that Dr. Armstrong’s statement that the claimant has no permanent physical restrictions as a result of his compensable

injury is not credible. Instead, I find that the greater weight of the credible evidence shows that the claimant's compensable injury has permanently restricted him from engaging in any employment requiring repetitive or prolonged bending or twisting at the waist, frequent or prolonged lifting in excess of 10 pounds and any lifting or carrying in excess of 30 pounds. These are essentially the restrictions voiced by the claimant during his testimony. I not only find him to be a credible witness, but I also find these restrictions to be similar to those normally seen in cases involving surgically repaired herniated lumbar discs.

As required by Ark. Code Ann. § 11-9-522(b)(1), the claimant's permanent impairment and the resulting permanent restrictions and limitations are to be considered in light of his age, education, prior work experience, and all other matters reasonably expected to affect his future earning capacity. In this regard, the evidence reveals the claimant is 49 years old, has a high school diploma, has approximately 30 to 40 college hours, and has 17 to 20 years experience in dealing with computer systems.

The evidence shows, that at the time of the claimant's compensable injury, he was earning approximately \$56,000.00 per year in the position he held with the respondent. However, the physical restrictions from his compensable injury would prevent him from performing in the specific employment position he held with the respondent at the time of his compensable injury. He was only able to maintain an employment position with the respondent, because the respondent modified his previous position, so that he was no longer required to bend, stoop, crawl, lift and carry weights in excess of 30 pounds.

His testimony shows that since his termination by the respondent he has been able to obtain employment positions that have only paid him between approximately \$25,000.00 and \$30,000.00 per year. The respondent's vocational expert, David Christopher Hampton, testified that the claimant should be able to obtain employment, which within his physical restrictions and in the computer services would pay \$45,000.00 to \$65,000.00 per year. However, he knew of no such actual employment positions available at the present time. In fact, he stated:

“I cannot think of something that I have that I can say Mr. Gardner is fit for today.”

This witness did describe an individual, who he had just been placed in a position that paid \$52,000.00 a year (plus over-time). He stated that this individual had about the same amount of experience as the claimant. However, he gave no comparison in regard to this individual's formal education, as compared to the claimant. Nor, was he entirely clear as to the physical demands of this position. Finally, he gave no indication as to whether this position was permanent or temporary.

I have no doubt that there are a considerable number of potential employment positions in the computer field for which the claimant would be qualified and that would be within his physical limitations and restrictions. I also have no doubt that some of these positions might pay, at least temporarily, more than the claimant's current position. However, I cannot believe that there is a substantial number of positions for which the claimant would be qualified by experience and formal education that would pay the claimant \$56,000.00 per year. Clearly, the respondent felt that they had too many positions at this pay scale, when they terminated the claimant's employment in November of 2002. The claimant is clearly not a stupid individual. I find it difficult to believe that he would intentionally take employment positions for the past two years that only paid \$25,000.00 to \$35,000.00 a year, if it were so easy for him to obtain an employment position that paid \$45,000.00 to \$65,000.00 per year. Certainly, he would not intentionally suffer such a large disparity in wages over such a lengthy period merely to attempt to increase his potential recovery from his workers' compensation claim.

After consideration of all the factors mandated by Ark. Code Ann. §11-9-522(b)(1), I find that the claimant has proven by the greater weight of the credible evidence that he has experienced a permanent functional disability or loss of wage earning capacity, as a result of his compensable lumbar spine injury, that is equivalent to a permanent partial disability of 10% to the body as a whole. This is addition to the permanent partial disability benefits to which he is entitled for the 10% permanent physical impairment due to this compensable injury.

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On February 21, 2002, the relationship of employee-employer-carrier existed between the parties.
3. On February 21, 2002, the claimant earned wages sufficient to entitle him to weekly compensation benefits of \$425.00 for total disability and \$319.00 for permanent partial disability.
4. On February 21, 2002, the claimant sustained a compensable injury to his lumbar spine in the form of herniated disc at L5-S1.
5. There is no dispute over the payment of medical expenses incurred through May 30, 2002.
6. It is impossible to ascertain from the stipulations and the evidence presented whether the respondents have accepted liability for and have paid the expense of medical services rendered to the claimant for his compensable low back injury by and at the direction of Dr. Larry Armstrong (including replacement prescription medication) after May 30, 2002. However, if the respondents have not accepted liability for and have not paid such expenses, these medical services would constitute reasonably necessary medical services for the claimant's compensable injury. The expense of these services would be the liability of the respondents herein subject to the Commission's medical fee schedule.
7. The medical service rendered to the claimant for his compensable low back injury by Dr. Larry Armstrong, in the form of an office visit in December of 2003, and replacement of the claimant's prescription medication for the chronic effects of his compensable back injury, also represent reasonably necessary medical services. Pursuant to Ark. Code Ann. §11-9-508, the expenses of these services are the result liability of the respondents herein, again subject to the medical fee schedule

established by this Commission.

8. The claimant has sustained a 10% permanent physical impairment as the result of his compensable injury of February 21, 2002. Pursuant to Ark. Code Ann. §11-9-522(a), he is entitled to permanent partial disability benefits for this degree of impairment.
9. The claimant has proven by the greater weight of the credible evidence that he has also experienced permanent functional disability or loss of wage earning capacity, as a result of his compensable injury, that is equivalent to a 10% permanent partial disability to the body a whole. Pursuant to Ark. Code Ann. §11-9-522(b), he is entitled to this degree of permanent partial disability in addition to that for permanent physical impairment.
10. The respondents have controverted the claimant's entitlement to any permanent partial disability benefits for permanent functional disability or loss of wage earning capacity and his entitlement to the medical services rendered him by and at the direction of Dr. Charles Jennings.
11. A reasonable fee for the claimant's attorney is the maximum statutory attorney's fee on the permanent partial disability benefits herein awarded for permanent functional disability or loss of wage earning capacity (i.e. 10% to the body as a whole).

ORDER

The respondents shall pay to the claimant permanent partial disability benefits equivalent to a 20% permanent partial disability to the body as a whole. This includes permanent partial disability attributable to a permanent physical impairment of 10% to the body as a whole and permanent partial disability attributable to permanent functional disability in the amount of 10% to the body as a whole. The respondents are entitled to credit for all such benefits previously paid.

The respondents shall be liable for the expense of the medical services provided to the claimant for his compensable injury by and at the direction of Dr. Charles Jennings, which includes an office visit in December of 2003 and the replacement medication subsequently prescribed by

Dr. Jennings. This liability is subject to the medical fee schedule established by this Commission.

The respondents shall pay to the claimant's attorney the maximum statutory attorney's fee on the controverted permanent partial disability benefits for permanent functional disability, which is herein awarded (i.e. 10% to the body as a whole). One-half of this fee is the obligation of the respondents in addition to these benefits. The remaining one-half of this fee is to be withheld by the respondents from these benefits.

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.

MICHAEL L. ELLIG
Administrative Law Judge