

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F302996

DAVID JONES

CLAIMANT

AREA AGENCY ON AGING

RESPONDENT

RISK MANAGEMENT RESOURCES,
TPA

RESPONDENT

OPINION FILED JUNE 30, 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 CURTIS NEBBEN, Attorney, Fayetteville, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above styled claim on April 13, 2004, in Fort Smith, Arkansas. A pre-hearing order was entered in this case on February 11, 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, the claimant, with no objection being made by the respondent, requested that the issue concerning his entitlement to temporary partial disability benefits be withdrawn. Thus, this issue was withdrawn. A copy of the pre-hearing order with this amendment noted thereon, was made Commission's Exhibit No. 1 to the hearing.

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

1. On March 11, 2003, the relationship of employee-self insured employer-third party carrier existed between the parties.
2. The appropriate weekly compensation rates are \$107.00 for both total disability and permanent partial disability.
3. The claimant sustained compensable injuries to his neck and back on March 11, 2003.

4. There is no dispute over any benefits accruing through May 23, 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 benefits under Ark. Code Ann. §11-9-505(a).
2. The claimant's entitlement to additional medical services.
3. Appropriate attorney's fee.

In regard to these issues, the claimant contends that he was released to return to restricted duty lifting not more than 30 pounds on June 30, 2003, and that although the employer had work available within those restrictions, the employer refused to allow the claimant to return to work without legitimate cause. Accordingly, the claimant contends he is entitled to benefits pursuant to Ark. Code Ann. §11-9-505(a) for a period not to exceed one year

In regard to these issues, the respondent contends that the claimant is entitled to additional medical expenses on the basis that they do not arise out of the compensable injury or in the alternative, they are unreasonable and unnecessary. The respondent contends that the claimant is not entitled to 505(a) benefits.

DISCUSSION

I. APPLICABILITY OF ARK CODE ANN. §11-9-505(a)

_____The first issue to be addressed concerns the claimant's entitlement to the benefits provided by Ark. Code Ann. §11-9-505(a). The burden rests upon the claimant to prove his entitlement to benefits under this subdivision.

In order to meet his burden, the claimant must prove by the greater weight of the credible evidence the existence of the following facts. First, he must prove that the respondent had an employment position available that was within his "physical and mental limitations". Secondly he must prove that the respondent refused to provide him with such a position. Finally, he must prove that the respondent's refusal was "without reasonable

cause”.

The claimant testified that shortly after his compensable injury, the respondent returned him to a “light duty” position that was within the restrictions recommended by his treating physician. In this light duty position, the claimant merely accompanied another driver on that driver’s route. His duties were to ride along and help keep the passengers seated. However, he testified that he occasionally did the actual driving. At some point, the respondent advised him that this light duty position was no longer available (he is not entirely clear when this occurred).

The claimant testified that on June 23, 2003, he was advised by the respondent that he would “never” be placed back in a “driver” position again, even though it was his opinion that he was physically capable of performing the duties required by this position. The claimant first testified that he could not recall whether the respondent’s had told him that he could not be put back in a “driver” position, until he provided the respondent’s with a full “release”. He then stated that he did recall “at one point” that he was told he would need a release from his doctor, before he could be placed back in a “driver” position.

The medical evidence shows that on May 12, 2003, the claimant returned to Dr. Holder with increased complaints of pain “ after he started driving a van again”. At that time, Dr. Holder released the claimant to return to work with restrictions against lifting more than 30 pounds more than one-third of the time. He also limited the claimant’s bending, stooping, and twisting. Finally, he directed that the claimant should be able to alternately sit, stand, and walk as tolerated with no sitting for longer than 30 minutes. The claimant was clearly under these restrictions on June 23, 2003.

The medical evidence shows that the claimant next returned to Dr. Holder on June 30, 2003. At that time, he was complaining of “no more than the usual” low back pain. He also requested Dr. Holder to give him a “full release”. Although Dr. Holder did not give him a “full” release, the only specific physical restrictions and limitations mentioned in this

report of June 30, 2003, is no lifting in excess of 30 pounds over head.

The claimant testified that on February 9, 2004, he obtained a “full” release from some physician. There are no reports or records contained in the medical evidence concerning this visit, nor does the medical evidence contain this release.

The claimant’s testimony does not reflect that he ever returned to the respondent, seeking employment, after either the June 30, 2003 release by Dr. Holder or the “full”release in February of 2004.

Tina Doan Kline, the transportation supervisor for the respondent, testified that the claimant was initially provided limited or light duty, in which he only assisted another driver and was not required to do any lifting or driving. She further testified that this position “run out” or was no longer available by June 23, 2003. At that time, she advised the claimant of this fact and further informed him that the only available positions were those as a part time “driver”. Finally, she advised him that in order to be placed in this position, it would be necessary for him to obtain a “full” release from his physician that specifically stated he could lift at least 40 pounds. She testified, as did the claimant, that the claimant never returned seeking employment following this conversation. She acknowledged that she had made no attempt to contact the claimant and expressly offer him a position, even though she had been advised by his attorney, in February of 2004, that this required release had been obtained (I would again note that this release has not been offered into evidence).

The testimony of Ms. Kline, and Respondent’s Exhibit No. 2 reveals that the “driver” position would also involve a considerable amount of sitting. This “position” expressly required lifting up to 40 pounds and being able to assist passengers with mobility problems. The claimant testified that during his brief period of employment with the respondent (less than six months), he was never required to lift up to 40 pounds or assist mobility impaired passengers. However, it is obvious that this position would reasonably require such capabilities. Clearly, the respondent had the right to require the individual holding this

position to possess the necessary physical abilities set out in the job summary. It might also be noted that the claimant does not dispute the fact that this position would require considerable sitting, as well as the ability to bend, get up and down from a seated position, climb stairs, and walk on uneven ground.

The medical records show that, prior to his employment with this respondent, the claimant had experienced significant difficulties with his lower back. These difficulties not only resulted in his inability to perform his prior employment, but also played a significant role in his being found permanently totally disabled for social security purposes. In August of 2001, the claimant was again (or still) under active medical treatment by Dr. Thomas Cheyne of the Arkansas Valley Orthopaedic Clinic for continuing low back and radicular complaints. An MRI study, performed on August 17, 2001, revealed an L4-5 circumferential annular bulge extending into the left neural foramen representing intraforaminal disc protrusion equivalent. This study also showed that this permanent defect had progressively worsened since the previous MRI on July 14, 2000. The testimony of Ms. Kline indicates that the respondent was not aware the claimant was on full social security disability or the true extent of his previous back difficulties, when he was initially employed.

Finally, I would also note that at the hearing the claimant moved in a slow and deliberate manner and with apparent difficulty. He also exhibited signs of physical difficulty when attempting to sit down and arise from the witness chair, making audible moans and groans.

It is my finding that the greater weight of the credible evidence shows that the "light duty" position, which the respondent provided the claimant immediately after his injury, was no longer "available" after June 23, 2003. Thus, the respondent's failure to continue the claimant in this position would not form the basis to impose the sanctions provided by §11-9-505(a).

The greater weight of the credible evidence establishes that the only position which the respondent had available, on and after June 23, 2003, was the position of a “driver”. I further find that the respondent’s refusal to place the claimant in this position, on and after June 23, 2003, was not without reasonable cause. On June 23, 2003, the claimant was still under medical restrictions imposed by Dr. Holder, which indicated that he was not physically capable of lifting more than 30 pounds, on May 12, 2003. These restrictions show that the claimant was not physically capable of lifting more than 30 pounds, more than a third of the time, could only perform limited bending, stooping, and twisting, and was required to sit, stand, and walk only as tolerated with no sitting in excess of 30 minutes. Regardless of the claimant’s testimony (concerning the requirements of this position, it is apparent that the potential and reasonably expected physical demands of this position), it is apparent that the potential and reasonably expected physical demands of this position exceeded these restrictions.

The greater weight of the credible evidence also that this initial refusal was conditional and would be reconsidered, whenever the claimant provided the respondent with a medical statement indicating he was physically capable of performing all the duties reasonably required of the “driver” position. The evidence fails to show that the claimant has ever provided the respondent with the required medical report (stating that he was now physically capable of performing the duties of the “driver” position) and requested the respondent to place him in this position. It is my opinion that it was incumbent upon him to do so. Until that time, the respondent’s initial refusal continued to be for “reasonable cause”.

Finally, it is my opinion that the greater weight of the evidence presented establishes that the “driver” position (the only position shown to be available) continues to be unsuitable and not within the claimant’s physical limitations. There is no medical evidence presented to indicate that the claimant is physically capable of performing the reasonably

required duties of this position. His testimony that he believes himself physically capable of performing all of the duties required by this position is contradicted by his flare up in symptoms when he attempted to drive the van in early May of 2003 and by the rather extreme difficulties he manifested in simply sitting down and arising from the witness chair.

In fact, the medical evidence presented supports the conclusion that the claimant was physically incapable of performing the reasonably required duties of a “driver” position at the time he was originally hired by the respondent. The medical evidence shows that the claimant at that time clearly had a significant permanent and progressive defect involving his lumbar spine with resulting neurological compromise. This type of permanent injury obviously resulted in significant restrictions on the claimant’s physical capabilities, particularly in regard to lifting, bending, twisting, and stooping. This type of permanent injury would also make the claimant an unsuitable candidate for any employment position that required prolonged sitting, standing, or walking. Any of these activities would place the claimant at substantial risk of further accelerating what has already been shown to be a progressive permanent condition.

In summary, I find that the claimant has failed to establish the necessary requirements to entitle him to benefits under Ark. Code Ann. §11-9-505(a). Specifically, he has failed to prove that the respondent had a position available for him that was within his physical limitations. He has further failed to show that the respondent has refused, without reasonable cause to return him to any position that was available. Thus, his request for benefits under this subdivision must be denied.

II. ADDITIONAL MEDICAL SERVICES

Under Ark. Code Ann. §11-9-508, the claimant is entitled to all “reasonably necessary medical services” for his compensable injury. However, the burden rests upon the claimant to prove that any medical services in dispute constitute “reasonably necessary medical services”, within the meaning of 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. Both of these matters are primarily, if not entirely, medical questions.

In the present case, the claimant has offered no medical evidence that would indicate that his compensable injury reasonably requires any further medical treatment. There is no evidence that any additional medical services have been provided or even recommended. When the claimant was last seen by Dr. Holder, on June 30, 2003, his complaints with his cervical injury had apparently disappeared and his complaints with his lumbar injury appear to have stabilized. It appears from this report that the only reason for this visit was an attempt by the claimant to obtain a “full release”. At that time, no further medical treatment appears to have been recommended by Dr. Holder.

The claimant was discharged on that date from medical care and was to return only on a PRN basis (patient return as needed). There is no evidence that the claimant has subsequently returned to Dr. Holder. Finally, there is no evidence that any other physician has provided or recommended the claimant with any medical services that would be arguably connected with or necessitated by his compensable injury.

It is impossible to determine if additional medical services are reasonably necessary when the medical record fails to show that any additional medical services have been provided or recommended for the claimant’s compensable injury. In order to make such a determination the nature and purpose of the service in question must be shown.

Thus, I have no alternative but to find, at the present time, that the claimant has failed to prove the reasonableness and necessity of any additional medical services and no benefits can be awarded under Ark. Code Ann. §11-9-508. The claimant’s request for such benefits must be, at the present time, denied.

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On March 11, 2003 , the relationship of employee-self insured employer-third party administrator existed between the parties.
3. On March 11, 2003, the claimant earned wages sufficient to entitle him to weekly compensation benefits of \$107.00 for both total disability and permanent partial disability benefits.
4. On March 11, 2003, the claimant sustained a compensable injury to his neck and back.
5. There is no dispute over any benefits accruing through May 23, 2003.
6. The claimant has failed to prove by the greater weight of the credible evidence that he is entitled to the benefits provided by Ark. Code Ann. §11-9-505(a). Specifically, he has failed to prove by the greater weight of the credible evidence that the respondent has had available, after June 23, 2003, an employment position that was within his physical and mental limitations. The claimant has also failed to prove by the greater weight of the credible that the respondent has refused, without reasonable cause, to provide him with any employment position that was available.
7. The claimant has failed to prove by the greater weight of the credible evidence that he is entitled to any additional medical services. Specifically, the claimant has failed to prove by the greater weight of the credible evidence the existence of any medical services that would be reasonably necessary for his compensable injury.
8. The respondent has controverted the claimant's entitlement to any benefits under Ark. Code Ann. §11-9-505(a) and his entitlement to any additional

medical services, which were unpaid as of the date of hearing.

ORDER

Based upon my foregoing findings and conclusions, I have no alternative but to deny the claimant's request for benefits under Ark. Code Ann. §11-9-505(a).

For the reasons heretofore set forth in this Opinion, I also find that I must also, at this time, deny the claimant's request for additional medical services at the respondent's expense.

The foregoing claims for additional benefits are hereby denied and dismissed.

IT IS SO ORDERED.

MICHAEL L. ELLIG
Administrative Law Judge