

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F302419

ROY TURNER

CLAIMANT

RURAL DEVELOPMENT, INC.
UNINSURED

NO. 1 RESPONDENT

NATIONWIDE INS. CO.
INSURANCE CARRIER

NO. 2 RESPONDENT

OPINION FILED OCTOBER 11, 2004

Hearing before ADMINISTRATIVE LAW JUDGE ELIZABETH DANIELSON in Springdale, Washington County, Arkansas.

Claimant represented by JASON WATSON, Attorney, Fayetteville, Arkansas.

Respondent No. 1 represented by BURTON STACY, JR., Attorney, Bentonville, Arkansas. Notified but not present.

Respondent No. 2 represented by MICHAEL RYBURN, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held on August 10, 2004, in Springdale, Arkansas.

A pre-hearing conference was held in this claim, and as a result a pre-hearing order was entered in the claim on June 2, 2004. This pre-hearing order set forth the stipulations offered by the parties, the issues to litigate and the contentions thereto.

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

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.

2. Respondent No. 1 canceled their workers' compensation insurance policy on January 14, 2003.

The issues to be litigated are as follows:

1. Compensability of the claimant's low back injury on February 13, 2003.

2. Related medical.

3. Temporary total disability from February 14, 2003, to a date to be determined.

4. Compensation rate.

5. Attorney's fees.

6. Did Respondent No. 2 have coverage according to Arkansas law on February 13, 2003.

In regard to the foregoing issues the claimant contends that he suffered an injury on February 13, 2003, while moving a section of fence. He felt four sharp pains in his back, forcing him to the ground.

In regard to the foregoing issues Respondent No. 1 confesses judgement in this matter. See Commission Exhibit No. 2.

In regard to the foregoing issues Respondent No. 2 contends that it does not know if the claimant was an employee or if he was injured on the job. The employer canceled the policy in December. The cancellation was effective prior to the alleged injury.

The documentary evidence submitted in this matter consists of the Commission's pre-hearing order marked Commission's Exhibit No. 1. A letter from Respondent No. 1's attorney marked Commission's Exhibit No. 2. The claimant submitted medical records marked Claimant's Exhibit No. 1 and a letter marked Claimant's Exhibit No. 2. All these exhibits were admitted without objection.

All parties were given notice of the hearing but Respondent No. 1 did not appear. A letter was sent to the Commission from Mr. Burton Stacy, Respondent No. 1's attorney, indicating that they would not appear but would be available by telephone. Respondent No. 1's attorney did fax a letter to the Commission which is marked Commission's Exhibit No. 2.

DISCUSSION

The claimant testified that his primary working experience has been in landscape construction work. The claimant testified that he went to work for the respondent in October 2002, noting that Russell W. McClellan was the owner of the respondent business. The claimant explained that the respondent business is a landscape company primarily doing retaining walls. The claimant testified that he worked full time and worked exclusively for the respondent from October 2002 through February 13, 2003. The claimant testified that he was paid by check every Friday and earned \$12.50 per hour and worked on an average of forty hours per week. The claimant testified that Mr. McClellan directed as to what time he should report for work and where to report for work as well as provided tools and equipment to perform the job. The claimant testified that taxes were withheld from his earnings.

The claimant testified that on February 13, 2003, he was helping move a section of fence with Mr. McClelland and another employee when he miss stepped and felt shooting pain in his back. The claimant testified that he had pain immediately and did go to the ground and it took him a minute or two before he was able to

get up. The claimant remembered that when he was able to get up he was not able to straighten up. The claimant testified that this event occurred around 9:00 a.m. and that he was not able to complete the scheduled work day. The claimant testified that he has not worked for the respondent since February 13, 2003. The claimant stated that he contacted the respondent the following Monday, the 17th, and told him that he was still having back problems and needed to go to the doctor as well as requested payment for that previous Thursday. The claimant stated that he was told that he had no money coming and he was on his own.

The claimant testified that he initially was seen by Dr. Billy Hall at the Gravette Medical Center and Dr. Hall examined him as well as prescribed anti-inflammatories and pain medications as well as gave him an off work slip for at least ten days. The claimant testified that he returned to see the respondent after he was seen by Dr. Hall even though his condition had not improved. The claimant testified that he had attempted to get a hold of the respondent but that he would not return his calls. The claimant stated that the respondent did contact him about six weeks later after these proceeding had begun and the respondent told him that it was time for him to get back to work and when the claimant told him he could not go back to work at that time, the respondent told him that he was going to sue him. The claimant testified that the respondent also talked to him about workers' compensation and that the conversation got nasty and that was the last time he spoke with the respondent.

The claimant agreed that he has seen only Dr. Tucker and Dr. Hall for treatment of his injuries. The claimant agreed that the muscle spasms which Dr. Tucker's report set forth have continued from time to time and he still feels that he is in need of medical treatment.

The claimant testified that he has worked for other businesses even though he still experiences pain in his back every day. The claimant stated that prior to February 13, 2003, he did not have any problems with his back other than the general aches and pains one would have when doing construction type work. The claimant stated that he had never had a workers' compensation claim prior to this claim. The claimant testified that he still has \$168.00 in outstanding medical bills as a result of his compensable injury and that all of his other medical bills for his work related injury were paid in cash from his own pocket.

On cross examination, the claimant was asked if he was having back spasms in February and March when he was first seen by Dr. Hall and Dr. Tucker. The claimant answered that yes he was having pain but was unsure what a spasm was. The claimant stated that his back would tense up if that was what a spasm was. The claimant stated that currently he still has some pain from time to time and does have a little numbness in his hips. The claimant testified that he worked for a friend for a couple of days and discovered that he could not do the work and then he was off work until August. The claimant testified that he then went to work for a temporary company for a little while. The claimant testified that

in April he was working for LaRue Contractors laying a water line in Tontitown. The claimant stated that he was hauling a piece of pipe and stepped in a hole and this caused his back to start hurting again.

The medical records set forth that the claimant was seen at the Gravette Medical Associates on February 17, 2003, with complaints of injuring his back last Thursday morning moving a section of fence. The claimant was diagnosed with a lumbar sprain and medications were prescribed. The claimant was again seen at the Gravette Medical Associates on March 7 with complaints of back pain not improved due to a back injury moving a fence. Again the claimant was diagnosed with lumbar sprain and medications were prescribed. On March 7, 2003, there is a note taking the claimant off work for ten working days for his back injury. On September 10, 2003, the claimant was seen by Dr. Tucker where it is noted that the claimant's x-rays do not reveal a herniated disc just a bulging disc and physical therapy has not improved his condition. It is noted that there is some tenderness of the paravertebral back muscles, some spasms and he was diagnosed with persistent lumbar strain.

There is a letter from the respondent's carrier dated January 28, 2003, noting that they are acknowledging the respondent's request for cancellation of his workers' compensation policy, that cancellation to be affective January 14, 2003.

There is a letter which is Commission's Exhibit No. 2 sent by Russell McClelland, Respondent No. 1's attorney, dated August 10,

2004. This letter sets forth that pursuant to the conversation that morning his client, Russell McClelland, hereby confesses judgement in the above referenced case.

After a complete review of this record, I find that the claimant has proven by a preponderance of the evidence that he sustained a compensable back injury while working for the respondent on February 13, 2003. The claimant has testified to a specific incident while performing employment services. The claimant reported this injury as being work related and sought medical treatment four days later for which he was given medication and physical therapy. The medical records set forth that the claimant was experiencing back spasm although this doctor's notation was not made until September 10, 2003. The claimant's testimony, however, has been that he has been experiencing spasms or, in his words, tenseness in his muscles from the beginning. The respondents, therefore, should pay for the cost of this claimant's medical treatment for his compensable injury as well as reimburse him for those medical cost which he has paid himself. The claimant testified that he was earning \$12.50 per hour and worked a forty-hour week. This would entitle him to a workers' compensation rate of \$330.00 per week for temporary total disability and \$250.00 for permanent partial disability. The claimant has requested temporary total disability, however, there is only one medical record dated March 7, 2003, taking the claimant off work for a period of ten days due to his back injury. The only indication as to the claimant's restrictions or inability to work are set forth in Dr.

Tucker's note dated September 24, 2003, when he indicates that the claimant is taking medications and has continued to have problems and difficulties mostly on any type of bending and lifting activities. Dr. Tucker sets forth that the claimant is unable to do that type of activity at this time. Dr. Tucker restricted the claimant's work but did not indicate that he was unable to work nor did he take him off work. The claimant, therefore, is entitled to three days of temporary total disability in accordance with Ark. Code Ann. §11-9-501(a)(1).

The respondent carrier has contended that the insurance policy being carried by the respondent business for their workers' compensation was canceled at the time of the claimant's injury. In the claimant's testimony he stated that his injury occurred at 9:00 a.m. on February 13, 2003. Ark. Code Ann. §11-9-408(b)(1) sets forth that an employer may cancel coverage with a carrier by giving the carrier at least thirty days notice, unless a shorter period is permitted.... Ark. Code Ann. §11-9-408(b)(1)(A) sets forth that cancellation of coverage is affective at 12:01 a.m. thirty days after the date the cancellation notice is received by the carrier. The parties have stipulated that the employer canceled their policy with the respondent carrier on January 14, 2003. In Grubbs v. Credit General Insurance Company, 327 Ark. 479, 939 S.W. 2d 290 (1997) the Arkansas Supreme Court addressed the question of cancellation notice of an insurance policy. The Court in the Grubbs case set forth that;

When construing a cancellation clause in an insurance policy requiring ten days prior

notice, we have interpreted that to mean something different, namely ten full days of notice. See Northwestern National Company v. Thomas, 248 Ark. 989, 455 S.W. 2d 87 (1970). In Thomas we expressly described what constituted ten days notice by an insured prior to the cancellation date.

The Court in the Thomas case set forth that they would interpret the cancellation clause in a light most favorable to the insured setting forth that the sensible conclusion is that Thomas had ten days after the mailing of the notice in which to pay for the endorsement. The Court noted that Thomas' notice was said to have been mailed on November 26 and that date is not to be counted in computing the ten-day grace period allowed by the contract. The Court then excluded November 26 and counted ten full days following the notice. Following the directive in the Grubbs and Thomas cases when counting the thirty day grace period January 14 would not be counted but the thirty days would begin to be counted on the 15th. Therefore, cancellation did not become affective until thirty full days had lapsed after notice of cancellation. Excluding the 14th, thirty full days would indicate that the workers' compensation policy was in affect at the time of this claimant's injury. Therefore, the respondent's workers' compensation insurance policy was in affect at the time of this compensable injury.

FINDINGS & CONCLUSIONS

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. Respondent No. 1 canceled their workers' compensation insurance policy on January 14, 2003.

3. The claimant has proven by a preponderance of the evidence that he sustained a compensable injury to his low back on February 13, 2003. See discussion above.

4. The respondents should pay for the medical treatment for this claimant's compensable back injury as well as reimburse him for the medical treatment he has paid for his injury.

5. The claimant is entitled to a workers' compensation rate of \$333.00 per week for temporary total disability and \$250.00 for permanent partial disability.

6. The claimant has proven that he is entitled to three days of temporary total disability to be paid by the respondent. See discussion above.

7. The employer respondent's workers' compensation insurance policy was in affect at the time of the claimant's compensable injury. See Ark. Code Ann. §11-9-408(b)(1)(A) as well as Grubbs v. Credit General Insurance Company, 327 Ark. 479, 939 S.W. 2d 290 (1997). All see discussion above.

8. The respondents have controverted this claim in its entirety.

9. The claimant's attorney is entitled to the maximum statutory attorney's fee based on the benefits awarded herein.

ORDER

The claimant has proven by a preponderance of the evidence that he sustained a compensable injury while working for the respondent on February 13, 2003.

The respondents should pay three days of temporary total disability at the rate of \$333.00 per week as well as the cost of the claimant's medical treatment for his compensable injury as well as reimbursement for treatment the claimant has paid himself.

The respondent's workers' compensation insurance policy was in affect at the time of the claimant's compensable injury.

The respondents shall pay to the claimant's attorney the maximum statutory attorney's fee on the additional benefits awarded herein, with one half of said attorney's fee to be paid by the respondents in addition to such benefits and one half of said attorney's fee to be withheld by the respondents from such 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.

ELIZABETH DANIELSON
ADMINISTRATIVE LAW JUDGE