

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F312019

LES BOHANNAN	CLAIMANT
UNITED PARCEL SERVICE, INC.	RESPONDENT
LIBERTY MUTUAL FIRE INS. CO. INSURANCE CARRIER	RESPONDENT

OPINION FILED SEPTEMBER 16, 2005

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

Claimant represented by KENNETH OSBORNE, Attorney, Fayetteville, Arkansas.

Respondents represented by JAMES ARNOLD, II, Attorney, Fort Smith, Arkansas.

STATEMENT OF THE CASE

A hearing was held on June 21, 2005, 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 April 29, 2005. 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. On October 31, 2003, the relationship of employee-employer-carrier existed between the parties.

3. The claimant sustained a compensable injury to his low back on October 31, 2003.

4. Medical expenses have been paid.

5. The claimant is entitled to a weekly compensation rate of \$349.00 for temporary total disability and \$262.00 for permanent partial disability.

6. Temporary total disability has been paid through November 5, 2004, and from January 14, 2005, through February 28, 2005.

7. The respondents agree to pay temporary total disability from February 28, 2005, through March 2, 2005, with an appropriate attorney's fee.

By agreement of the parties the issues to litigate are limited to the following:

1. The claimant's entitlement to additional temporary total disability from December 30, 2004, to January 14, 2005, then from March 2, 2005, to a date to be determined.

2. Attorney's fees.

In regard to the foregoing issues the claimant contends that due to a back injury he has received restrictions of no lifting over ten pounds, no stooping and no bending. Claimant has made numerous job applications which have all been denied and he is currently unemployable and should be entitled to receive TTD on an ongoing basis. Claimant also contends he is entitled to additional medical expenses ongoing and attorney's fees.

In regard to the foregoing issues the respondents contend that the claimant is not entitled to additional temporary total disability benefits at this time. The respondents further contend that we have not controverted any portion of this claim except for the claimant's entitlement to temporary total disability benefits

between November 5, 2004, and January 15, 2004, and for the period after February 28, 2005, through today's date.

The documentary evidence submitted in this matter consists of the Commission's pre-hearing order marked Commission's Exhibit No. 1. The claimant submitted medical documentation marked Claimant's Exhibit No. 1 and Claimant's Exhibit No. 2 and other documentation marked Claimant's Exhibit No. 3. The respondents submitted medical documentation marked Respondents' Exhibit No. 1. All these exhibits were admitted without objection.

DISCUSSION

The claimant testified and it has been stipulated by the respondents that he sustained a compensable injury to his back on October 31, 2003. The claimant testified that he continued to work for the respondent until he voluntarily resigned on November 5, 2004. The claimant indicated that when he resigned he had not been placed on any kind of medical restrictions by any doctor. The claimant agreed that the first time a physician placed him on medical restrictions was on December 30, 2004, by Dr. Luke Knox. The claimant testified that the restrictions given to him by Dr. Knox were no lifting over ten pounds, no stooping or bending. The claimant testified that once he was given these restrictions, he approached the respondent about employment and he was turned down. The claimant testified that he then went to the unemployment office and no work was found due to his restrictions.

The claimant testified that Dr. Knox operated on his back on January 14, 2005. The claimant agreed that he began receiving

temporary total disability from the date of his surgery up through March 2, 2005. The claimant testified that Dr. Knox released him on March 2, 2005, with restrictions of no lifting over ten pounds, no stooping or bending. The claimant testified that again he went to the respondent to see if they would rehire him but they would not. The claimant testified that he then went to seventeen or eighteen different businesses seeking employment but none of them would hire him due to his restrictions. The claimant testified that following his surgery, he has been engaged in physical therapy at least three times a week but that for the two weeks prior to this hearing he has been going to physical therapy twice a week. The claimant testified that Dr. Knox has arranged an appointment with him with a pain doctor, Dr. Cannon. The claimant testified that he has an appointment with Dr. Cannon scheduled for June 30, 2005, to get some epidural shots. The claimant testified that it is his understanding that if the shots relieve his leg pain, Dr. Knox will then consider doing a fusion. The claimant testified that the pain which he has in his back and down his leg is constant and that he cannot stand or sit for any length of time without changing his position. The claimant testified that his restrictions have been lessened to no lifting over twenty pounds and no stooping or bending.

The claimant testified that he began work for the respondent on March 18, 1999, and worked up and through November 4, 2004. The claimant testified that he has a college degree in Agri Business. The claimant testified that he has called all the poultry plants in

the area but once they learn of his restrictions his employment application is turned down. The claimant testified that if he were a supervisor in a poultry plant, he would have to stand on concrete all day long and that is something he cannot do.

On cross examination, the claimant agreed that following his compensable injury as well as prior compensable injuries while working for the respondent, the respondent provided alternate work for him within his recommended restrictions. The claimant agreed that during the periods of time he was off work at the recommendation of his physician for his compensable injury he received temporary total disability. The claimant also agreed that during the periods of time he was released to light duty work, the respondents accommodated his restrictions. The claimant agreed that in late December 2003 his doctor released him to full duty and he returned to work for the respondent. The claimant testified that following his release he did not ask to have another doctor appointment scheduled but he did say numerous times that his back still hurt. The claimant testified that the reason he resigned from his employment on November 5, 2004, was because he was placed on a new route and felt he did not have adequate training to handle these jobs as well as his back was hurting. The claimant testified that about two weeks to ten days after he resigned, he notified the respondents that he needed to be seen by a doctor and the respondents made him a doctor's appointment. When asked about the circumstances surrounding his resignation, the claimant testified that he had made numerous calls asking for help because he did not

know where to deliver the boxes to the businesses and no one would help him. The claimant testified that he got mad and quit. The claimant testified that he drove back to the respondent's business, laid his clipboard down and walked off. The claimant testified that he knew that it was against company policy to park a vehicle without unloading it. The claimant testified that he understood that the reason the respondent will not hire him back is due to the circumstances under which he quit.

On redirect examination, the claimant testified that he has voluntarily gone back to the respondent and would go back to work for them immediately. The claimant testified that the respondent rehires people all the time, further noting that no one else will hire him with his limitations.

Sam Kilpi testified that he was the risk management director for the mid south district of the respondent's business. Mr. Kilpi testified that he is responsible for and familiar with the claimant's workers' compensation claim. Ms. Kilpi testified that temporary alternative work is provided for every employee with restrictions for as long as their restrictions are in place in hopes of bringing them back to full employment. This witness testified that the claimant would have these benefits provided to him from December 30, 2004, up to the date of his surgery on January 14, 2005, if he had not quit. Mr. Kilpi testified that when the claimant was released on March 2, 2005, with restrictions, the claimant would have been allowed to work earning his full paycheck as long as these restrictions were in place if he had not

voluntarily quit. Mr. Kilpi testified that on the day the claimant resigned, he knew that he would not be in a rehire status because it was the company policy that if you voluntarily quit the company you will not be rehired.

On cross examination, Mr. Kilpi testified that he has reviewed the claimant's limitations and restrictions and that there would be work available for him within his limitations with the respondent.

Mike Hadaway testified that he had been employed by the respondent for twenty-seven years and was currently an on call supervisor at their Springdale center. Ms. Hadaway testified that the claimant was working under his supervision the last two days of the claimant's employment. Ms. Hadaway testified that the claimant had been assigned a cover route and that the first day he had gone with the claimant over the route and the next day the claimant was on his own. Mr. Hadaway testified that a cover route is sort of a fill in route for people on vacation. Mr. Hadaway testified that he was not in the office the day the claimant quit and it was his understanding that the claimant had returned the package car partially loaded and walked off.

On rebuttal, the claimant testified that he understood why the respondents would not let him come back to work because he walked off his job.

The medical records document the claimant's compensable low back injury particularly noting an MRI dated November 4, 2003, which revealed a left posterior disc protrusion at L4-5 with neuro compromise but no free fragment as well as minimal disc bulging at

L5-S1 without stenosis. On November 7, 2003, Dr. John Gaston took the claimant off work as a result of his herniated disc with radiation of pain into his left leg, noting that he was being referred to physical therapy and possibly to a neurosurgeon. On December 4, 2003, Max Beasley with the Arkansas occupational Health Clinic released the claimant to work at restricted duty of no bending and twisting at the waist and avoid lifting more than ten pounds as well as be able to change positions between standing and sitting. On December 18, 2003, Dr. Gary Moffitt released the claimant to full duties with no return appointment and no permanent impairment. The claimant was next seen for complaints of pain in his low back with pain running down his left leg with numbness by Dr. Gary Moffitt on November 16, 2004. Dr. Moffitt, at that time, recommended physical therapy. On follow up on November 30, 2004, Dr. Moffitt recommended that the claimant be seen by a neurosurgeon, however he did return the claimant to work that same day. The claimant underwent a MRI on December 28, 2004, which revealed that he had a degenerative L4-5 disc with a focal disc protrusion and annular fissure in the left paracentral region. Dr. Brown also notes that there is mild posterior displacement of the nerve root at this level possibly related to the claimant's left leg pain. On December 30, 2004, Dr. Luke Knox released the claimant to return to work with no lifting over ten pounds with no stooping and bending until his scheduled surgery. Dr. Luke Knox performed a hemilaminotomy and micro discectomy on the claimant on January 14, 2005. Dr. Knox writes on March 2, 2005, that the

claimant has not had any therapy following his surgery and he has had a recurrence of his leg pain over the past couple of weeks. Dr. Knox notes that he gave the claimant a shot of Depo Medrol and he instituted a physical therapy regime. Dr. Knox released the claimant to return to work on restrictions of no lifting above ten pounds and to avoid stooping or bending for four hours a day then after two weeks it can be for eight hours a day. Dr. Knox writes again on April 14, 2005, that the claimant's x-rays showed mild disc space settling at the level of his surgical sight but that it showed stable appearing end plates without evidence of inflammation. Dr. Knox writes that he suspects that the claimant is suffering the affects of the disc space settling related to his surgical endeavors and encouraged him to work through his difficulties. Dr. Knox increased the claimant's weight restriction up to twenty pounds and to return in six weeks.

After a review of this matter as well as a review of Arkansas law, I find that the claimant has proven by a preponderance of the evidence that he is entitled to temporary total disability from December 30, 2004, to the date of his surgery on January 14, 2005, and then again from his release by Dr. Knox to light duty work on March 2, 2005, to a date to be determined. On December 30, 2004, Dr. Knox released the claimant to restricted duty work of no lifting more than ten pounds with no stooping or bending, further noting that surgery was pending. The claimant testified that he approached the respondent about putting him back to work within his restrictions and they refused due to their company policy of no

rehire under the circumstances in which he had terminated his employment. The respondents have indicated in their testimony that there would be jobs available or made available for the claimant if he had not terminated his employment status with them in the matter in which he did. The claimant, however, has testified that he has presented himself with his restrictions and expressing a desire to return to work for the respondent, therefore, no longer refusing employment suitable to his capacity. Ark. Code Ann. §11-9-526 sets out that if any injured employee refuses employment suitable to his or her capacity offered to or procured for him, he shall not be entitled to any compensation during the continuance of the refusal. In this instance the claimant has not continued to refuse employment but the respondent has refused to offer him suitable employment within his restrictions. This same reasoning and finding shall apply to the period following the claimant's release after his surgery from March 2, 2005, to a date to be determined. The claimant is still in an active healing period following his surgery in that he continues to attend physical therapy two to three times a week at least through May 30, 2005, as set forth in the documentary evidence and Dr. Knox has noted that the claimant is having difficulty with his disc space settling at the level of his surgery sight. Dr. Knox, on April 14, 2005, had even rescheduled a return appointment with the claimant for follow up within six weeks. There is no indication that this claimant has reached the end of his healing period and he has been released to restricted duty which the respondent has refused to accommodate.

The claimant is not continuing to refuse employment, therefore, the respondents should pay temporary total disability to this claimant from December 30, 2004, to January 14, 2005, then from March 2, 2005, to a date to be determined. Also see Superior Industries v. Thomaston, 72 Ark. App. 7, 32 S.W. 3d 52 (2000). Also see Barnette v. Allen Canning Company, 49 Ark. App. 61, 896 S.W. 2d 444 (1995).

FINDINGS & CONCLUSIONS

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

2. On October 31, 2003, the relationship of employee-employer-carrier existed between the parties.

3. The claimant sustained a compensable injury to his low back on October 31, 2003.

4. Medical expenses have been paid.

5. The claimant is entitled to a weekly compensation rate of \$349.00 for temporary total disability and \$262.00 for permanent partial disability.

6. Temporary total disability has been paid through November 5, 2004, and from January 14, 2005, through February 28, 2005.

7. The respondents agree to pay temporary total disability from February 28, 2005, through March 2, 2005, with an appropriate attorney's fee.

8. The claimant has proven by a preponderance of the evidence that he is entitled to temporary total disability from December 30, 2004, to January 14, 2005, and then again from March 2, 2005, to a date to be determined. See discussion above.

9. The respondents have controverted this claimant's claim for additional benefits.

10. 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 is entitled to additional temporary total disability from December 30, 2004, to January 14, 2005, and then again from March 2, 2005, to a date to be determined. The respondents should pay temporary total disability to this claimant for these periods of time.

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