

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F411253

EUGENE GRAY, EMPLOYEE

CLAIMANT

BFI-ALLIED WATER SYSTEMS N AM INC., EMPLOYER

RESPONDENT

INS CO-STATE OF PENNSYLVANIA, CARRIER

RESPONDENT

OPINION FILED JUNE 27, 2005

Hearing before ADMINISTRATIVE LAW JUDGE ANDREW L. BLOOD, on June 15, 2005, at Little Rock, Pulaski County, Arkansas.

Claimant represented by the HONORABLE MARCELIERS HEWETT, Attorney at Law, Little Rock, Arkansas.

Respondents represented by the HONORABLE R. SCOTT MORGAN, Attorney at Law, Pine Bluff, Arkansas.

STATEMENT OF THE CASE

A hearing was conducted in the above-style claim to determine claimant's entitlement to workers' compensation benefits.

On May 3, 2005, a pre-hearing conference was conducted in this claim from which a Pre-hearing Order of the same date was filed. The Pre-hearing Order reflects stipulations entered by the parties, the issues to be addressed during the course of the hearing, and the parties' contentions relative to the issues. The Pre-hearing Order is herein designated a part of the record as Commission's Exhibit #1.

The testimony of Mr. Eugene Gray, the claimant, coupled with medical reports and other documents, comprise the record in this claim. Ms. Freda Gray, the claimant's wife was available to provide testimony, however the parties stipulated that her testimony would be corroborative of that of the claimant.

DISCUSSION

Eugene Gray, the claimant, with a date of birth of January 28, 1953, is a high school graduate. Claimant commenced his employment with respondent on April 16, 1990, and continued in the employment of same through September 2004. Claimant's testimony reflects that in the 1980's he attended and completed a truck driving school.

During the course of this employment with respondent, the testimony of the claimant reflects that he worked on the yard, delivered trash bins, and drove trash truck. Claimant denied that he experience any restrictions or limitations relative to his back prior to February 2004. Further, claimant's testimony reflects that he did not require medical treatment relative to his back prior to February 2004, nor had he suffered any injuries to his back prior to the February 2004 date.

In February 2004, claimant suffered an injury to his low back within the course and scope of his employment with respondent. There is not a dispute regarding the February 2004, low back injury of the claimant which was sustained while pushing a six yards trash can at the Rose Law Firm. The injury was reported to appropriate supervisory personnel of respondent. Claimant sought and obtain medical treatment at the emergency room of St. Vincent Infirmity Medical Center. The injury was diagnoses as a back strain and claimant was prescribed medication. Claimant's testimony reflects that he was unable to take the medication due to an adverse reaction.

Claimant was subsequent seen by respondents' designated medical provider regarding the diagnosed lumbar strain. Medical treatment provided to the claimant by the afore included x-rays, two (2) injections, and medication. The credible evidence in the record reflects that

claimant only missed one day from work as a results of the February 2004, low back strain.

Claimant's testimony reflects that within two weeks of the February 2004, injury his low back strain had completely resolved.

On August 20, 2004, claimant operated a front end pick-up dump truck in his employment with respondent. The testimony reflects that while operating the truck during the course of a day claimant usually pick-up three loads of trash. Claimant testified that he did not encounter any difficulty with the first load; however when he pick up the second load he observed that the brakes on his truck were "acting up". Claimant notified the dispatcher who in turn contacted the mechanic. After delivering the load and inspecting the truck, claimant attributed the difficult to possibly water on the brakes. Claimant noted that a substantial amount of rain had fallen on August 20, 2004, and that water from the load of trash had fallen on the brakes. After dumping his load at the land fill claimant applied the brakes and the vehicle appeared to be functioning appropriately.

After picking up his third load, claimant's testimony reflects that when he attempted to apply the brakes they would not engage. Claimant testified that when he attempted to engage the brakes he had just topped a hill, which caused the truck to speed up, and that as he approached a railroad crossing he observed that a train was sitting on the track. Claimant was able to avoid the track and navigate the truck into an area long or parallel to the track. Claimant testified that once the vehicle came to a rest the train began to move and caught one side of the fork of the truck.

Claimant testified that when the train struck the fork of the truck he was bounced about within the cab of the truck and suffered injuries to his upper and lower back in the process. The

occurrence of the August 20, 2004, motor vehicle accident is not disputed. Further, there is not a dispute regarding the fact that claimant reported the accident to appropriate supervisory personnel of respondent.

Following the accident, claimant testified that he reported to supervisory personnel to respondent that his back was hurting. There is no evidence in the record to reflect that claimant was directed to receive treatment under the care of respondent's designated medical provider following the August 20, 2004, accident.

The testimony of the claimant reflects that on Saturday, August 21, 2004, he received a telephone call from his supervisor, Kenneth Taylor, informing him that he was suspended from work until further notice. Claimant testified that at the time he informed Mr. Taylor that he need to see a doctor because of the pain in his back. The testimony of the claimant reflects that Mr. Taylor informed him that he could go to a doctor but respondent would not pay for it.

The credible testimony of the claimant reflects that on August 21, 2004, the day following the accident, he was stiff, sore and painful as a results of having been bounced about in the truck during the accident. Claimant noted that his symptoms progressively worsen to the point that on Monday, August 23, 2004, he contacted his family physician, Dr. Archie Hearne, for medical treatment, however an appointment could not be scheduled until the following day, Tuesday, August 24, 2004.

Claimant received treatment under the care of Dr. Hearne from August 24, 2004, through February 25, 2005, for complaints relative to his low back. The medical in the record reflects that following his examination of August 24, 2004, Dr. Hearne assessed claimant's complaint as low back pain and an acute lumbar sacral sprain, for which claimant was prescribed Flexeril,

Hydrochlorothiazide, Norvasc, Ultracet. (CX 2, p1-3) Further the medical in the record reflects that on January 17, 2005, claimant underwent an MRI of his lumbar spine at Baptist Medical Center, pursuant to the directions of Dr. Hearne. The MRI disclosed:

Broad based bulge with small left paramedian disc protrusion at the L4-5 level. There is mild central stenosis with the small protrusion approximating the intracranial left L5 nerve root. No gross nerve root displacement is seen.

Defused annular bulging with small central to right paramedian disc protrusion at the L5-S1 level. There is mild central stenosis. The protrusion approximate the intracranial right S1 nerve root without gross displacement. (CX 1,p41-42)

Dr. Hearne assessed the claimant's complaint during the January 21, 2005, visit as low back pain worsening , sciatica worsening, acute lumbar sacral sprain worsening. Claimant was continued on the previously prescribed medication, however the Flexeril and Ultracet were discontinued. Claimant was prescribed Naprosyn during the January 31. 2005, visit, to Dr. Hearne. (CX 1, p33-36)

Claimant was next seen by Dr. Hearne on February 24, 2005, relative to his low back complaint. Following his examination of the claimant during the afore visit, Dr. Hearne's assessment of claimant's complaints was low back pain worsening, sciatica worsening, acute lumbar sacral sprain worsening, and benign hypertension under control. Claimant was prescribed Naprosyn during the February 24, 2005, visit and directed to follow up in one month. (CX 2, p37-39)

The evidence in the record reflects that claimant was informed that his employment with respondent was terminated in September 2004, because of the August 20, 2004, motor vehicle

accident, which serves as the basis for the present claim. After a period of disqualification, the testimony in the record reflects that claimant received unemployment compensation benefits from September 2004, through March 2005, at a weekly rate of \$311.00. On March 28, 2005, claimant secured employment with the Little Rock Street Department.

Claimant asserts that as a result of the August 20, 2004, accident he was rendered total incapacitated from engaging in gainful employment through March 2005, and is entitled to corresponding temporary total disability benefits. Claimant also asserts entitlement to medical benefits relative to the treatment received regarding the injury suffered in the August 20, 2004, motor vehicle accident. Respondents have controverted this claim in its entirety, asserting a lack of objective medical findings necessary to sustain the burden of proof of a compensable injury pursuant the Arkansas Workers' Compensation statute.

After a thorough consideration of all of the evidence in this record, to include the testimony of the witness, a review of the medical reports and other documentary evidence, coupled with the application of the appropriate statutory provision and case law, I make the following:

FINDINGS

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On August 20, 2004, the relationship of employee-employer-carrier existed among the parties.
3. On August 20, 2004, the claimant earned wages sufficient to entitle him to weekly compensation benefits of \$453.00/\$340.00, for temporary total/permanent partial disability.
4. On August 20, 2004, the claimant sustained an injury arising out of and in the

course of his employment.

5. The claimant was temporarily totally disabled for the period beginning August 21, 2004 and continuing through March 28, 2005.

6. The respondent shall pay all reasonable hospital and medical expenses arising out of the injury of August 20, 2004.

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

CONCLUSIONS

_____ There is no dispute that claimant was involved in a motor vehicle accident on August 20, 2004, within course and scope of his employment with respondent. The claimant asserts that as a result of the motor vehicle accident he suffered injuries which rendered him totally incapacitate from engaging in gainful employment for a period of time and required medical treatment for which respondents are liable. Respondents maintains that any injury suffered by the claimant on August 20, 2004, does not meet the requirement of a compensable injury pursuant to the Arkansas Workers' Compensation statues, and, as such claimant is not entitled to the payment of workers' compensation benefits.

The present claim is one governed by the provisions of Act 796 of 1993, in that claimant asserts entitlement to workers' compensation benefits as a result of an injury having been sustained subsequent to the effective date of the afore provision. Ark. Code Ann. §11-9-102(4)(A) defines that a compensable injury to mean:

- (i) Accidental injury causing internal or external physical harm to the body . . . arising out of and in the course of employment and which requires medical services or results in disability or death. An injury is "accidental" only if it is caused by a specific incident and is identifiable time

and place of occurrence.

In order to prove a compensable injury as a result of a specific incident which is identifiable by time and place of occurrence, claimant must establish by a preponderance of the evidence an injury arising out of and in the course of employment, that the injury caused internal or external harm to the body which required medical services or resulted in disability or death, medical evidence supported by objective findings (as defined in Ark. Code Ann. §11-9-102(16)), establishing the injury, and that the injury was caused by a specific incident and identifiable by time and place of occurrence. Mikel v. Engineered Speciality Plastic, 56 Ark. App. 126, 938 S.W. 2d 876 (1997).

In the instant claim, claimant was employed by respondent from April 16, 1990, through September 2004. There is no evidence in the record to reflect that claimant experienced any limitations or restrictions on his physical activity relative to his back prior to February 2004. In February 2004, claimant suffered an injury within the course and scope of his employment with respondent which was diagnosed as a lumbar strain, and for which he received sanction medical treatment. Claimant missed one day from work as a result of the February 2004, injury. The credible evidence in the record reflects that the claimant's February 2004, low back injury resolved within two weeks of its occurrence. There is no evidence to reflect that the claimant was operating under any physical or medical restrictions relative to his low back between March 2004, and August 20, 2004.

The occurrence of the August 20, 2004, motor vehicle accident suffered by the claimant within the course and scope of his employment of respondent is not disputed. Further, there is not a dispute regarding the mechanics of the August 20, 2004, accident, or the manner in which

claimant was tossed about within the cab of the vehicle in the course of the accident. Following the August 20, 2004, accident, claimant notified appropriated supervisory personnel of respondent that he had hurt his back in the accident. On August 21, 2004, claimant informed appropriate supervisor personnel of respondent that he was in need of medical treatment relative to the injury suffered in the accident. Respondents failed and/or refused to authorize medical treatment relative to the claimant's injury growing out of the August 20, 2004, motor vehicle accident.

On August 24, 2004, claimant was seen by his primary care physician, Dr. Archer Hearne, for complaints attributable to the August 20, 2004, compensable accident. The medical in the record reflects that claimant treated with Dr. Hearne from August 24, 2004 through February 24, 2005, relative to the injuries suffered in the August 20, 2004, compensable accident. The medical further reflects that throughout his treatment with Dr. Hearne claimant was prescribed anti-inflammatory medication, muscle relaxants, and pain medication to address his injury growing out of the accident.

Further, on January 17, 2005, pursuant to the direction of Dr. Hearne claimant underwent a lumber MRI at Baptist Medical Center. The results of the MRI reflects findings consistent with the complaints registered by the claimant attributable to the August 20, 2004, compensable injury. Specifically, the MRI disclose a broad base bulge with small left paramedian disc protrusion at the L4-5 level, mild central stenosis with the small protrusion of approximating the intracanalicular left L5 nerve root, along with defused angular bulging with small central to right paramedian disc protrusion at L5-S1 level.

The objective medical findings as reflected in the January 17, 2005, MRI report coupled

with Dr. Hearne's prescription of Flexeril and other muscle relaxants and pain medication along with credible the testimony of the claimant preponderates that the claimant suffered injuries which caused internal harm to the body and required medical services resulting in disability, as well as the presence of medical evidence supported by objective findings establishing the injury growing out of the August 20, 2004, accident. The evidence preponderates that the claimant suffered a compensable injury to his low back on August 20, 2004, growing out of the motor vehicle accident within the course and scope of his employment with respondent. Respondents have controverted this claim in its entirety.

Temporary total disability is that period within the healing period in which a claimant suffers an total incapacity to earn wages. Arkansas State Highway & Transportation Department v. Breshears, 272 Ark. 244, 613 S.W. 2d 392 (1981); Georgia Pacific Corp. v Carter, 62 Ark. App. 162,969 S.W.2d 677 (1998). The healing period is that period for healing of an injury which continues until the claimant is as far restored as the permanent character of the injury will permit. If the underlying condition causing the disability has become more stable and nothing further in the way of treatment will improve that condition, then the healing period has ended. Nix v. Wilson World, 46 Ark. App. 303,879 S. W. 2d 457 (1994).

In the instant claim claimant suffered the compensable accident on Friday, August 20, 2004. On August 21, 2004, the residuals of the claimant's injury were such that he informed supervisory personnel of respondent of the need for medical treatment. Respondents refused to provide or authorize medical treatment for the claimant relative to the August 20, 2004, accident. Claimant presents credible testimony regarding stiffness, soreness and pain in his neck, shoulders, lower back attributable to the impact of the truck with the train and being bounced

about within the cab of the truck. The medical in the record reflects that the claimant was seen on a regular basis by Dr. Hearne subsequent to the initial August 24, 2004, visit, and each time directed to remain off work. Claimant has sustained his burden of proof by a preponderance of the credible evidence that he remained within his healing period and totally incapacitated from engaging in gainful employment from August 21, 2004 through March 28, 2005, and correspondingly entitled to the payment of temporary total disability benefits. Respondents have controverted the claimant's entitlement to all workers' compensation benefits relative to the August 20, 2004, compensable injury, to include temporary total disability benefits.

Claimant received unemployment compensation benefits at the weekly rate of \$311.00 for the period September 2004 through March 28, 2005. As previously noted, claimant was within his healing period during the afore period and entitled to the payment of temporary total disability benefits at the weekly compensation benefit rate of \$453.00.

Ark. Code Ann. §11-9-506(b) provides:

Provided, however if a claim for temporary total disability is controverted and later determine to be compensable, temporary total disability shall be payable to an injured employee with respect to any week for which the injured employee received unemployment benefits but only to the extent that temporary total disability otherwise payable exceeds the unemployment benefits.

In the instant claim, claimant's temporary total disability benefits exceeded his unemployment benefits by \$142.00 per week during the period that he received same. Claimant is entitled to the payment of the different by respondents.

AWARD

Respondents are hereby ordered and directed to pay to the claimant temporary total

disability benefits at the weekly compensation benefit rate of \$453.00, for the period commencing August 21, 2004, and continuing through March 28, 2005, as a result of the August 20, 2004, compensable injury. Said sums accrued shall be paid in lump without discount.

Respondents are entitled to a credit against the unemployment compensation benefits received by the claimant during the afore period.

Respondents are further ordered and directed to pay all reasonable related medical, hospital, nursing, and other apparatus expenses, to medical related travel, growing out of the claimant's compensable injury of August 20, 2004.

Maximum attorney fees are herein awarded to the claimant's attorney on the controverted indemnity benefits awarded, pursuant to Ark. Code Ann. §11-9-715.

This award shall bear interest at the legal rate pursuant to Ark. Code Ann. §11-9-809, until paid.

Matters not addressed herein are expressly reserved.

IT IS SO ORDERED.

Andrew L. Blood
Administrative Law Judge