

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F411251

KEVIN ROAM

CLAIMANT

CINTAS CORPORATION

RESPONDENT

FIDELITY & GUARANTY INSURANCE,
INSURANCE CARRIER

RESPONDENT

OPINION FILED MAY 25, 2005

Hearing before ADMINISTRATIVE LAW JUDGE MICHAEL L. ELLIG in Fort Smith, Sebastian County, Arkansas.

Claimant represented by GUNNER DeLAY, Attorney, Fort Smith, Arkansas.

Respondents not appearing at hearing.

STATEMENT OF THE CASE

A telephone pre-hearing conference was scheduled in this case on December 21, 2004. Notice of this conference was provided to the respondents by certified mail. Although the post office department's return receipt indicates that notice of this pre-hearing conference was received on December 23, 2004, no one appeared on the respondents' behalf at the pre-hearing conference. A review of the Commission's file reflected that no response had been received by the Commission from the initial letter of inquiry that was sent to the respondents by the Director of Operations and Compliance on October 25, 2004. The pre-hearing conference was conducted without the respondents and the pre-hearing order entered.

A copy of the pre-hearing order, which has been made Commission's Exhibit No. 1 to the hearing, was forwarded to the respondents, again by certified mail. This pre-hearing order directed the respondents to state their contentions within 10 days of their receipt of the Order. It also scheduled the matter for a full hearing on March 15, 2005. The receipt of this pre-hearing order was acknowledged by the respondents on the appropriate U. S. Post Office Department return form, on January 3, 2005.

The respondents did not state their contentions with 10 days of their receipt

of this Order, as directed. In fact, the respondents made no contact, whatsoever, with this Commission following the receipt of the pre-hearing order.

The claimant and his attorney appeared at the scheduled hearing. However, no one appeared on behalf of the respondents. The hearing proceeded as scheduled, on March 15, 2005.

There were no stipulations.

At the request of the claimant, the following issues were litigated and submitted for resolution:

1. Whether the relationship of employee-employer-carrier existed between the parties on or about March 15, 2004.
2. The appropriate weekly compensation rates.
3. Whether the claimant sustained a compensable injury to his back on or about March 15, 2004.
4. The claimant's entitlement to the payment of medical expenses, temporary total disability benefits from April 2, 2004 through July 14, 2004, from August 12, 2004 through August 27, 2004, and from October 1, 2004 through February 4, 2005, and attorney's fees.

In regard to these issues, the claimant contends:

"The claimant contends that he sustained a lower back injury on or about March 15, 2004, that he is entitled to TTD from October 1, 2004, to a date yet to be determined, that he is entitled to the payment of medical expenses, and that he is entitled to PPD and wage loss disability.

In regard to these issues, the respondents have made no contentions.

DISCUSSION

Although the respondents have apparently decided not to respond or take part in this claim, there is no procedure for default judgement under the Arkansas

Workers' Compensation Act. The burden still rests upon the claimant to prove all of the elements necessary to entitle him to the workers' compensation benefits he is now seeking.

The first matter which he must prove is that the relationship of employee-employer-carrier existed between the parties at the time of his alleged compensable injury and that this was an employment relationship that is covered by this Act. In this regard, the claimant testified that he had been employed by the respondent for approximately 13 years, prior to the incident on or about March 15, 2004. His testimony further indicates that the respondents had sufficient employees to bring the respondent, Cintas Corporation, under the purview of the Arkansas Workers' Compensation Act. The Commission's records show that the respondent had coverage for workers' compensation purposes with Fidelity & Guaranty Insurance Company on March 15, 2004. Thus, I find that the relationship of employee-employer-carrier existed between the claimant, Cintas Corporation, and Fidelity & Guaranty Insurance Company on March 15, 2004.

The claimant testified that on March 15, 2004, he was earning an average weekly wage of \$720.00. This would entitle him to the maximum weekly compensation rates, in effect at that time. These maximum rates were \$453.00 for total disability and \$340.00 for permanent partial disability. I find the claimant's testimony sufficiently credible to prove that these are the appropriate weekly compensation rates for any compensable injury sustained on or about March 15, 2004.

The medical evidence presented "establishes" the actual existence of a physical injury and resulting physical defects that involved the claimant's lumbar spine. The actual existence of these physical injuries and resulting defects are further based upon or supported by purely objective findings on various radiographic studies, consisting of plain x-rays, an MRI study, and a CT scan. The operative report of Dr.

Capocelli further reveals that he observed these abnormalities, which involved the claimant's lumbar spine at the time of surgery. Therefore, the medical evidence presented is sufficient to satisfy the requirements of "compensability" that are contained in Ark. Code Ann. §11-9-102(4)(D).

The claimant testified that he had experienced some episodes of back pain and difficulties, prior to the incident on or about March 15, 2004. However, he stated that these previous difficulties and symptoms were not severe and did not prevent him from performing his rather strenuous employment activities and were nothing like the difficulties and symptoms that he experienced on or about March 15, 2004. The medical evidence shows that the claimant was experiencing some degree of lumbar defects prior to the March 15, 2004 incident (primarily, in the form of a right posterior lateral disc herniation at L4-5). However, the medical evidence further shows that after March 15, 2004, what Dr. Capocelli diagnoses as a recent or acute large right posterior lateral disc herniation at L5-S1. This defect was not present on the MRI that was performed prior to the incident on or about March 15, 2004.

In regard to his back injury, the claimant testified:

"I was at one of my stops in Knoxville, and I was doing my normal routine, bundled the clothes, and as I was carrying them into the truck, something just popped in my back and severe pain, and I fell to the floor in my truck and I couldn't do nothing. Man, I was laying flat out, and I got my phone and I called work and they sent a guy to come and get me."

"It (the guy who came and got him) was Mark Jones. He's like our--he checked us in every day; he's like a route checking guy and he runs and installs new accounts and stuff, and he was the only guy available at the time that they could send, so they sent him up there and, as a matter of fact, we ran--you know, I laid in the back of the truck and he finished my route and brought me back home."

The claimant testified that 2 to 3 days after the incident he was finally able to get in and see a physician, a Dr. Parham. Dr. Parham is a general practitioner and

referred the claimant to Dr. Capocelli, a neurosurgeon. He was initially seen by Dr. Capocelli on April 2, 2004, and surgery was ultimately performed by Dr. Capocelli on April 28, 2004.

I find the claimant's description of the events surrounding the onset of his difficulties, on or about March 15, 2004, to be credible and accurate. Clearly, the activities described by the claimant could have reasonably caused the large right sided posterior lateral disc herniation at L5-S1. This incident could also have reasonably aggravated the pre-existent right posterior lateral disc herniation at L4-5. The sudden and immediate onset of symptoms described by the claimant would clearly be indicative of the occurrence of the discal defect at L5-S1 and also of aggravation of the discal defect at L4-5. The evidence presented fails to show any other equally reasonable or logical cause for the sudden and immediate onset of the claimant's severe and disabling symptoms and the appearance of the right posterior lateral large disc herniation at L5-S1.

After consideration of all the evidence presented, and following the longstanding rule announced in such cases as Eddington v. City Electric Company, 237 Ark. 804; 376 S.W. 2nd 550 (1964), and Stephens Truck Lines v. Millican, 58 Ark. App. 275; 950 S.W. 2nd 472(1997), I find that the claimant has proven by the greater weight of the credible evidence that the medically established and objectively documented physical injuries to his lumbar spine arose out and occurred in the course of this employment with this respondent, were caused by a specific incident, are identifiable by time and place of occurrence, caused internal physical harm to the claimant's body, and required medical services and resulted in disability. Therefore, the claimant has proven all of the definitional elements for a "compensable injury," which are contained in Ark. Code Ann. §11-9-102(4)(A)(i).

In summary, it is my opinion that the claimant has proven that shortly before

March 15, 2004 (March 12 or 13, 2004), he sustained a compensable injury to his lumbar spine. Thus, it becomes necessary to determine the nature and extent of benefits to which the claimant is entitled for this compensable injury.

At the present time, the claimant is only seeking the payment of expenses incurred for reasonably and necessary medical services and temporary total disability benefits for the periods of April 2, 2004 through July 14, 2004; August 12, 2004 through August 27, 2004 , and from October 1, 2004 through February 4, 2005.

In order to constitute "reasonably necessary medical services" the medical services in dispute must be connected with or necessitated by the compensable injury. Further, the medical services must have a reasonable expectation of accomplishing the purpose or goal for which they were intended.

In the present case, the evidence presented shows that the medical services provided to the claimant for his back difficulties by and at the direction of Dr. Parham and Dr. Capocelli represent "reasonably necessary medical services." All of these services were necessitated by or connected with the claimant's compensable injury. These services were intended to accurately diagnose the nature and extent of the injury, to provide treatment to improve the actual physical damage occasioned by the compensable injury or at least stabilize such damage, and to provide the claimant with some degree of relief from the symptoms which the compensable injury was causing. All of the medical services provided were of a type and nature commonly recognized by the general medical community as being appropriate to accomplish these various purposes. Finally, it appears from the evidence presented, that these services not only had a reasonable expectation of accomplishing these purposes, but actually did so. Pursuant to Ark. Code Ann. §11-9-508, the respondents are liable for the expense of these services. However, such liability is limited to the medical fee schedule established by this Commission.

In order to be entitled to the temporary total disability benefits that the claimant now seeks, he must prove that he continued within his healing period from the effects of the compensable injury and was also rendered totally disabled from regular gainful employment as a result of this injury during the periods in question.

The duration of the healing period is a medical question, which must be resolved upon the basis of the greater weight of the credible evidence presented. The present medical evidence shows that the claimant continued under active medical treatment by Dr. Capocelli through February 4, 2005. In his report of that date, Dr. Capocelli notes that x-rays show "excellent evidence" of the fusion of the claimant's lumbar spine. He further observed that the claimant required no further testing or treatment and released him to return only on an as needed basis. It would further appear that the restrictions or limitations on the claimant's potential physical activities at that point become fixed or permanent. This evidence is sufficient to prove that the claimant continued within his healing period for his compensable injury from the date of its occurrence through February 4, 2005.

The claimant's testimony and the medical evidence indicates that, prior to February 4, 2005, the claimant was released to return to work only on a limited or light duty basis. The evidence further shows that the claimant actually attempted a limited or light duty position with the respondent on several occasions, but such restricted employment was not actually provided by the respondent. The significant restrictions placed on the claimant's potential employment activities, during these periods of light duty release would have effectively precluded him from having a reasonable opportunity of obtaining regular employment in the open job market. These restrictions included no lifting more than 10 to 15 pounds, no repeated bending, and no prolonged sitting, standing, or walking. Clearly, these restrictions would have prevented the claimant from returning to his pre-injury employment position with the

respondent, any similar employment, for the vast majority of positions for which the claimant was otherwise qualified. The claimant's failure to actually seek suitable employment from another employer, during this period, is reasonably explained by his desire if at all possible, to maintain his employment with the respondent (for whom he had worked some 13 years). It is unfortunate that the claimant's treatment was to allow his return to his pre-injury position with the respondent and that no other suitable position was apparently available.

It is my opinion that the evidence presented is sufficient to show that the claimant was rendered totally disabled from performing regular gainful employment by the temporary effects of his compensable injury for the periods of April 2, 2004 through July 14, 2004, from August 12, 2004 through August 27, 2004, from October 1, 2004 through February 4, 2005. Thus, he has proven the second and final requirement to entitle him to temporary total disability benefits during these periods.

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On all relevant dates, on or about March 15, 2004, the relationship of employee-employer-carrier existed between the parties.
3. On all relevant dates, on or about March 15, 2004, the claimant earned wages sufficient to entitle him to weekly compensation benefits of \$453.00 for total disability and \$340.00 for permanent partial disability.
4. On or about March 15, 2004 (actually, either March 12 or March 13, 2004), the claimant sustained a compensable injury to his back or lumbar spine. Specifically, he has proven the occurrence of a physical injury to

this portion of his body that is established by medical evidence, supported by objective findings, arose out of and occurred in the course of his employment, was caused by a specific incident, is identifiable by time and place of occurrence, caused internal physical harm to his body, required medical services, and resulted in disability.

5. The medical services rendered to the claimant for his back difficulties on and after March 15, 2004, and at the direction of by Dr. Parham and Dr. Capocelli represent reasonably necessary medical services for his compensable injury. The expense of these services, subject to the medical fee schedule established by this Commission, is the liability of the respondents herein.
6. The claimant was rendered temporarily totally disabled by his compensable injury for the periods of April 2, 2004 through July 14, 2004, from August 12, 2004 through August 27, 2004, and from October 1, 2004 through February 4, 2005.
7. The respondents have controverted this claim in its entirety.
8. A reasonable fee for the claimant's attorney is the maximum statutory attorney's fee on all indemnity benefits herein and hereinafter awarded to the claimant.

ORDER

The respondents shall pay to the claimant temporary total disability benefits for the periods beginning April 2, 2004 through July 13, 2004, from August 12, 2004 through August 27, 2004, and from October 1, 2004 through February 4, 2005. These benefits are to be at the weekly rate of \$453.00.

The respondents shall be liable for the medical expenses incurred by the claimant as the result of reasonably necessary medical services provided him for his

compensable injury by and at the direction of Dr. Parham and Dr. Capocelli. Such liability shall be 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 temporary total disability benefits herein awarded. One-half of this fee is the obligation of the respondents in addition to such benefits. The remaining one-half of this fee is to be withheld by the respondents from such benefits.

The respondents are liable for the cost of the taking and transcribing of the hearing held before this Commission on March 15, 2005. These costs total \$138.45. These costs are payable to the Commission's court reporter, Mr. Thomas G. Bloxom.

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