

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F408425

EARL WHITE	CLAIMANT
CERTIFIED HR SERVICES	RESPONDENT
CSC CLAIMS COMPANY, INC. INSURANCE CARRIER	RESPONDENT

OPINION FILED JULY 27, 2005

Hearing before ADMINISTRATIVE LAW JUDGE ELIZABETH DANIELSON in Fort Smith, Sebastian County, Arkansas.

Claimant represented by R. GUNNER DELAY, Attorney, Fort Smith, Arkansas.

Respondents represented by J. DAVID WALL, Attorney, Fayetteville, Arkansas.

STATEMENT OF THE CASE

A hearing was held on May 5, 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 March 7, 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 all pertinent dates, the relationship of employee-employer-carrier existed between the parties.

3. The claimant sustained a compensable injury to his low back on July 30, 2004.

4. The claimant is entitled to a weekly compensation rate of \$335.00 for temporary total disability and \$251.00 for permanent partial disability.

5. Medical expenses have been paid.

6. Respondents have accepted a 7 percent permanent partial impairment.

7. The respondents agree that the claimant is entitled to temporary total disability from the date of his surgery to the date of his doctor's release.

8. The parties agree that the respondent is entitled to a credit for the amount of permanent partial impairment which they have paid the claimant.

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

1. Additional temporary total disability from December 6, 2004, to the date of surgery.

2. Attorney's fees.

In regard to the foregoing issues the claimant contends that he is entitled to TTD from December 6, 2004 to the date of his surgery, as well as attorney's fees.

In regard to the foregoing issues the respondents contend that they have paid all benefits which the claimant is entitled to.

The documentary evidence submitted in this matter consists of the Commission's pre-hearing order marked Commission's Exhibit No

1. The claimant submitted documentary medical records marked Claimant's Exhibit No. 1. All these exhibits were admitted without objection.

#### DISCUSSION

\_\_\_\_\_The parties have stipulated that the claimant sustained a compensable injury to his low back on July 30, 2004, that all medical expenses have been paid and that the respondents agree and have accepted a 7% permanent impairment rating for the claimant's compensable injury.

The claimant testified that he has not been able to work since the date of his injury. The claimant testified that he underwent an MRI which Dr. Standefer read and indicated he had a nerve pressing up against one of his discs that was causing the pain to go down into his legs. The claimant testified that he underwent some bit of physical therapy, but that this did not improve the condition of his back. The claimant testified that in December of 2004, Dr. Standefer referred the claimant to Dr. Swicegood for pain treatment. The claimant testified Dr. Swicegood gave him a shot in the back which in his opinion made his problems worse noting that he was unable to get out of bed for approximately three days. The claimant testified that when he next saw Dr. Standefer he reported this and it was decided that he would not return for a follow up injection. The claimant testified that in December, he and Dr. Standefer discussed surgery. The claimant testified that Dr. Standefer told him that there was nothing else he could do for him unless he wanted surgery. The claimant stated that he asked Dr.

Standefer if the surgery was going to be immediate, and that the doctor told him no, that there were other things he had to do. The claimant testified that he wanted to discuss this surgery with his wife and he felt like she should know what was going on. The claimant testified that his case worker, Pamela, was there in the room with him and he told her that he needed a couple of days to think about it and he would get back with her. The claimant testified that he does not remember the exact date but he does remember that after his last appointment with Dr. Standefer, he does know that within two to three days he called Pamela and told her that he wanted to go through with the surgery. The claimant testified that he also called Mike Cowart, who works for CSC, to let him know that he wanted to go through with the surgery. The claimant testified that Pamela called him back and informed him that the respondent wanted him to get a second opinion. The claimant was asked if Dr. Standefer had ever released him to return to work and the claimant responded that he did not.

The claimant testified that he saw Dr. Blankenship for the first time on February 23, 2005, noting that this appointment was set up by the respondent. The claimant testified that Dr. Blankenship had him undergo additional MRI's and that he and Dr. Blankenship discussed surgery and he told Dr. Blankenship that he was willing to go forward with surgery. The claimant testified that Dr. Blankenship has not released him to full duty employment or to return to light duty employment.

The claimant testified that the pain he feels is constant although some activities do make it worse, such as sitting. The claimant testified that his pain radiates down into his legs, sometimes shooting into his toes but that most of the time the pain is in his calves and his ankles. The claimant testified that he can sit for about 20 minutes, but this sometimes depends upon the chair that he is sitting in. The claimant testified he is more comfortable standing because it stretches out his legs and that he does try to walk because the doctor has recommended he walk as much as he can. The claimant testified that he does not lift anything heavy but that he does try to help his wife with the groceries sometime.

On cross examination the claimant testified that his pain is about a 7 or 8 on a scale from 1 to 10. The claimant testified that his pain is about the same as it was when he last saw Dr. Standefer and his symptoms are about the same. The claimant testified that the physical therapy which Dr. Standefer prescribed for him consisted primarily of stretching, pressing his back up against the wall and sliding up and down, working on a tread mill as well as upper body machines. The claimant agreed that he last saw Dr. Standefer on December 6, 2004, and at that time Dr. Standefer's only option for him was surgery. The claimant testified that he was aware that Dr. Standefer had released him from his care because the only thing that he had to offer him was surgery. The claimant testified that he was aware that Dr. Standefer had given him a lifting restriction of nothing over 35 to 45 pounds, as well

as to alternate sitting, standing, and walking. The claimant was asked if Dr. Standefer had given him a piece of paper to take back to his employer indicating these restrictions. The claimant testified that Dr. Standefer did not indicate to him that he was to take these restrictions to his employer because Pamela, his case worker, was present and she was handling all of that for him.

The claimant agreed that after December 6, 2004, the respondent did contact him about coming back to work. The claimant testified that he attended a meeting with Pamela, his case worker, Kim, the new supervisor, Ray, and J.W. The claimant testified that there was a lot of argument and a lot of fighting going on during this meeting and that the owner of the respondent's business accused him of being a coward and a liar and he told him he was going to get something out of him. The claimant testified that the respondent wanted him to drive back and forth to Springdale to sweep out the trucks. The claimant testified that he told the respondent that he was not in a condition to do that. The claimant testified that he was to call in every day and that he did call in and talked to Faye, as well as to Ray, on another day explaining that he was on medication for his pain every morning. The claimant testified that he talked to his case worker and she told him she would get back with the respondent and let them know about his situation. The claimant testified again that he called his case worker as well as Mike Cowart to tell them about his decision to undergo surgery. The claimant testified that he did not tell Dr. Standefer he did not want to have surgery. He told Dr. Standefer at

that time he did not want to have surgery, that he wanted to talk to his wife about it and that within about two to three days he got back in touch with the respondent and told them he wanted surgery. The claimant testified again that when Dr. Standefer first mentioned surgery, it scared him and he wanted time to talk to his wife and other people about it.

On redirect examination the claimant testified that in December of 2004, he was completely broke and had instructed his attorney to contact the respondent about possibly settling this case. The claimant testified that this conversation and instruction to his attorney as done after he had communicated with the respondent that he was interested in undergoing surgery.

On recross examination the claimant was asked if Dr. Blankenship had ever given him a note taking him off work and the claimant responded, "no, he has not."

Kim Turner testified that she is employed by the respondent and was working July through December of 2004. Ms. Turner testified that Mike Cowart informed her that the claimant had been released on December 6, 2004, by Dr. Standefer. Ms. Turner testified that she began trying to call the claimant and since they were unsuccessful in making contact with the claimant, the owner of the business, J.W., wrote a letter to the claimant which was mailed on December 27<sup>th</sup>. This witness testified that the next day Pam Dinsmore called and arranged a meeting between herself, the respondent, and the claimant. Ms. Turner testified that the claimant was instructed to call in every day to see if there was

work available for him. This witness testified that the claimant called in a couple of times but then stopped calling in. Ms. Turner testified that the work available for the claimant would be in their Springdale warehouse sweeping and cleaning mats. This witness agreed that some days there would be work available within the claimant's restrictions and other days there would not. Ms. Turner testified that work would have been provided to the claimant had he called in.

On cross examination Ms. Turner testified that the claimant would be expected to drive to Springdale to work. Ms. Turner testified that the work would entail cleaning up, straightening up, and cleaning the bathrooms. Ms. Turner testified that this would not always be a full day job, but might entail a few hours depending on what there was for him to do. Ms. Turner agreed that the claimant would be expected to drive to Springdale on a hit-or-miss basis and work a few hours at a time.

On redirect examination Ms. Turner testified that at the meeting held in late December, the issue of surgery was discussed back and forth and by the end of the meeting the claimant was expressing a desire to undergo surgery.

On recross examination Ms. Turner testified that prior to the claimant's injury when he did work in Springdale he would drive or ride in a company truck to the Springdale area but that at present he would be required to drive his own vehicle. Ms. Turner explained that some of their people do drive their own cars if a moving truck is not required to go but that the claimant was a

driver and when he worked for them there was a lot of times they needed an extra truck in the Springdale area and he would drive it up there. Ms. Turner testified that she does not recall the claimant mentioning the cost of gasoline for driving back and forth but that he did mention that he did not have a vehicle.

The medical records set forth that the claimant was seen at Available Medical Care with complaints of low back, mid back, and leg pain on July 29, 2004. An MRI of the claimant's low back revealed that he had a moderate left paracentral disc herniation at L5-S1. Dr. Michael Standefer writes on September 9, 2004, that he has seen the claimant for his complaints of back pain and after examination and review of the claimant's MRI scan, he diagnosed the claimant with having left S1 radiculopathy secondary to a L5 disc protrusion. Dr. Standefer recommended that the claimant undergo physical therapy as well as epidural steroid injections and if these are not successful, then to consider surgery. Dr. Standefer continued to see and treat the claimant conservatively and referred him to Dr. John Swicegood, who saw the claimant on December 2, 2004, for a steroid injection. On December 6, 2004, Dr. Standefer writes that the claimant's steroid injection provided him only with minimal to no improvement and that he continues to have problems with his low back associated with his left lower extremity. Dr. Standefer indicates that the claimant does not wish to pursue surgery and that he, the doctor, has nothing further to offer him so that he is releasing him. The doctor writes that the claimant should pursue vocational technological job retraining and

recommended that he avoid heavy lifting no more than 35 to 45 pounds and then only on occasion, and in addition he should alternate sitting, standing, and walking.

The claimant was seen by Dr. James Blankenship on February 23, 2005, at the request of the respondent. After taking a history, examination, and review of the claimant's various tests Dr. Blankenship recommended surgery for the claimant or in the alternative to go through a functional capacity evaluation to determine what his true restrictions and limitations are. Dr. Blankenship also agreed with the 7% impairment rating as set forth by Dr. Standefer but did agree that this impairment rating would change if he went to surgery. The claimant underwent a discograph of his lower back on April 11, 2005, which revealed that the L5-S1 is most likely the pain generator for the claimant with the L4-5 level equivocal. On April 14, 2005, Dr. Blankenship writes that after reviewing the claimant's latest tests as well as examining the claimant, he is recommending surgery which the claimant agrees to undergo.

After consideration of all the evidence and testimony, I find that the claimant has proven by a preponderance of the evidence that he is entitled to temporary total disability from December 6, 2004 until the date of his surgery. The claimant was released by Dr. Standefer on December 6, 2004 with restrictions because he did not agree to the doctor's recommendation of surgery. The claimant has testified that he was frightened and wished to discuss surgery with his family before agreeing to undergo such a

procedure. The respondent's offer of employment although the claimant might have been physically able to do some of the tasks requiring him to drive two hours a day to perhaps work one or two hours in my opinion seems unreasonable particularly in light of the high cost of gasoline. I find therefore that the respondent did not reasonably accommodate this claimant's work restrictions and therefore should pay temporary total disability to him from December 6, 2004 until the date of his surgery. It has already been stipulated by the parties that the claimant will be entitled to temporary total disability from the date of his surgery until he is released by his physician.

#### FINDINGS & CONCLUSIONS

1. The Arkansas workers' Compensation Commission has jurisdiction of this claim.
2. On all pertinent dates, the relationship of employee-employer existed between the parties.
3. The claimant sustained a compensable injury to his low back on July 30, 2004.
4. The claimant is entitled to a weekly compensation rate of \$335.00 for temporary total disability and \$251.00 for permanent partial disability.
5. Medical expenses have been paid.
6. Respondents have accepted a 7 percent permanent partial disability.

7. The respondents agree that the claimant is entitled to temporary total disability from the date of his surgery to the date of his doctor's release.

8. The parties agree that the respondent is entitled to a credit for the amount of permanent partial impairment which they have paid the claimant.

9. The claimant has proven by a preponderance of the evidence that he is entitled to temporary total disability from December 6, 2004 until the date of his surgery. See Discussion above.

10. The respondents have controverted this claimant's entitlement to temporary total disability.

11. 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 temporary total disability from December 6, 2004 until the date of his back surgery.

The respondents shall pay temporary total disability to this claimant from December 6, 2004 to the date of his back surgery.

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.

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ELIZABETH DANIELSON  
ADMINISTRATIVE LAW JUDGE