

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F505631

ERIC HATHAWAY, Employee	CLAIMANT
JACKSON BROTHERS, Employer	RESPONDENT
CONTINENTAL CASUALTY COMPANY, Carrier	RESPONDENT

OPINION FILED JUNE 23, 2006

Hearing before ADMINISTRATIVE LAW JUDGE GREGORY K. STEWART in Springdale, Washington County, Arkansas.

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

Respondents represented by FRANK NEWELL, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

On May 31, 2006, the above captioned claim came on for a hearing at Springdale, Arkansas. A pre-hearing conference was conducted on March 8, 2006, and a pre-hearing order was filed on March 9, 2006. A copy of the pre-hearing order has been marked Commission's Exhibit #1 and made a part of the record without objection.

At the pre-hearing conference the parties agreed to the following stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.
2. Respondents controvert this claim in its entirety.
3. The claimant was earning an average weekly wage of \$450.00 which would entitle him to compensation at the rate of \$300.00 per week for temporary total disability benefits.

At the pre-hearing conference the parties agreed to litigate the following issues:

1. Whether claimant was an employee of respondent at the time of his alleged injury.
2. Compensability of gradual injury to claimant's back.

3. Temporary total disability benefits from May 24, 2005 through a date yet to be determined.

4. Medical.

5. Attorney fee.

At the time of the hearing the parties indicated that even though the respondent has denied compensability of claimant's back injury, it did apparently pay some temporary total disability benefits for a period of time; therefore, claimant's claim for temporary total disability benefits includes the period beginning May 24, 2005 through a date yet to be determined minus any benefits previously paid by the respondent.

The claimant contends he sustained a compensable injury to his back and that he is totally disabled and has been since he was fired due to limitations of no bending, lifting over 10 pounds, and no stooping. Further, no one will hire him with his current back related medical problems. The claimant also contends he has been denied medical treatment by Dr. Kendrick.

The respondents contend claimant was not an employee of respondent employer on May 5, 2005 since claimant's employment was terminated on May 4, 2005. Claimant was rehired on May 13, 2005, but was once again terminated on May 20, 2005. Respondent carrier initially paid some medical benefits, and temporary total disability benefits were paid at the rate of \$300.00 per week from May 27 through September 5, 2005. The respondents will assert a notice defense under A.C.A. §11-9-701. Respondents contend they do not owe any weekly benefits or additional medical benefits, and deny that claimant sustained a compensable injury.

From a review of the record as a whole, to include medical reports, documents, and other matters properly before the Commission, and having had an opportunity to hear the testimony of the witnesses and to observe their demeanor, the following findings of fact and conclusions of law are made in accordance with A.C.A. §11-9-704:

FINDINGS OF FACT & CONCLUSIONS OF LAW

_____1. The stipulations agreed to by the parties at the pre-hearing conference conducted on March 8, 2006 and contained in a pre-hearing order filed March 9, 2006 are hereby accepted as fact.

2. The claimant was an employee of the respondent at the time of his compensable injury.

3. Claimant has met his burden of proving by a preponderance of the evidence that he suffered a compensable injury to his back while working for the respondent.

4. Claimant is entitled to temporary total disability benefits beginning July 19, 2005 and continuing through a date yet to be determined. Respondent is entitled to a credit for any temporary total disability benefits paid subsequent to July 19, 2005 and for any wages claimant earned after that date.

5. Respondent is liable for all reasonable and necessary medical treatment provided in connection with claimant's compensable injury.

6. Respondent has controverted claimant's entitlement to all unpaid indemnity benefits.

FACTUAL BACKGROUND

The claimant testified that he believes he began working for the respondent in early April 2005. Claimant worked for the respondent as a route driver filling vending machines with soda pop and snacks. Claimant's job duties required him to lift boxes of snacks and cases of soda which he estimated weighed at least 20 pounds. Claimant also testified that he was required to lift bags of coins from the machines which he estimated weighed approximately 50 pounds.

Claimant testified that he first developed back problems about one week after he began working for the respondent. He described these problems as back pain and a burning pain in his right buttock. Claimant testified that he reported this problem to his

boss, Todd, who told claimant he should report these problems, but claimant testified that he did not want to lose his job so he did not report these symptoms to anyone other than Todd. Claimant testified that over time his symptoms continually worsened until he eventually sought medical treatment from Dr. Shaw, chiropractic physician. Claimant was also evaluated by Dr. Weum, a chiropractic physician, beginning on May 20, 2005. Claimant last worked for the respondent on May 24, 2005, and subsequent to that date sought medical treatment from Dr. Bertram. Dr. Bertram ordered an MRI scan and eventually referred claimant to Dr. Kendrick for an orthopaedic evaluation. Dr. Kendrick diagnosed claimant's condition as a disc herniation and treated claimant conservatively. Claimant subsequently underwent a second MRI scan in January 2006 which revealed a herniation at L5-5.

As previously noted, the respondent did apparently accept claimant's injury as compensable at some point and paid some temporary total disability benefits for a period of time. However, respondent subsequently controverted this claim in its entirety. As a result, claimant has filed this claim contending that he suffered a compensable injury to his back as a result of his job activities with the respondent. He seeks payment of temporary total disability benefits, medical benefits, and a controverted attorney fee.

ADJUDICATION

Claimant contends that he suffered a compensable gradual onset injury to his back as a result of his job activities with the respondent. A claimant requesting benefits for a gradual onset injury to the back must prove by a preponderance of the evidence that: (1) the injury arose out of and in the course of his employment; (2) the injury caused internal or external physical harm to the body that required medical services or resulted in disability or death; and (3) the injury was the major cause of the disability or need for treatment. *Freeman v. Con-Agra Foods*, 344 Ark. 296, 40 S.W. 3d 760 (2001); *Wal-Mart Stores, Inc.*

v. Leach, 74 Ark. App. 231, 48 S.W. 3d 540 (2001). In addition, objective medical evidence is necessary to establish the existence and extent of an injury. *Wal-Mart Stores v. VanWagner*, 337 Ark. 443, 990 S.W. 2d 522 (1999); *Wal-Mart v. Leach*, *supra*.

After reviewing the evidence in this case impartially, without giving the benefit of the doubt to either party, I find that claimant has met his burden of proving by a preponderance of the evidence that he suffered a gradual onset injury to his back as a result of his job activities with the respondent.

First, I note that claimant did testify that prior to beginning work for respondent he had a history of some back pain. Claimant testified that prior to working for respondent he had primarily performed manual labor jobs that required him to bend, stoop, lift, and carry. He also testified that as a result of those jobs he had what he described as “normal” back pain. Significantly, claimant testified that he had never sought any medical treatment for those back complaints prior to working for the respondent and indeed there is no medical evidence of record indicating otherwise.

Claimant testified that within approximately a week after he began working for the respondent he developed pain in his back which he attributed to the lifting of boxes of snacks and soda which weighed at least 20 pounds. Claimant also testified that he was required to lift bags of coins from the vending machines which weighed 50 pounds. According to claimant’s testimony he reported these back problems to his boss, Todd, but did not pursue them any further at that time. Claimant further testified that even though he had already begun suffering back pain he also had an incident while filling vending machines at Wal-Mart where he reported to his supervisor that he had done “something to my back,” and at his deposition claimant testified that his back popped while bending over to pick up soda pop.

The initial medical evidence in the form of a report from Dr. Weum, chiropractic physician, dated May 20, 2005 indicates that claimant was seen after complaining of low

back pain with an onset of approximately one week ago. Dr. Weum's medical report indicates that claimant does a lot of heavy lifting at work. A subsequent medical report from Dr. Bertram dated May 27, 2005 reflects the incident of claimant's back popping while lifting soda on May 5, 2005. Finally, Dr. Kendrick's medical report also contains a history of claimant having injured himself in May while lifting soda.

I find that claimant has met his burden of proving by a preponderance of the evidence that he suffered an injury which arose out of and in the course of his employment with the respondent to his back. As previously noted, claimant contends that he suffered an injury to his back in the form of a gradual onset injury as a result of the lifting he performed while working for the respondent. Claimant testified that in the course of his employment he was required to lift heavy weights including 20 pound cases of soda and 50 pound bags of coins. Claimant testified that on two occasions he reported back pain to his supervisor, but did not report his problems to anyone else at the respondent. Claimant did testify regarding one specific incident while lifting soda at Wal-Mart, but testified that he already had back pain prior to that date. Furthermore, I note that the medical reports contain histories indicating complaints of pain consistent with claimant's testimony with regard to the gradual onset nature as well as the specific incident at Wal-Mart.

I find the claimant's testimony to be credible and therefore find based upon his testimony as well as the remaining evidence presented that claimant suffered a back injury which arose out of and in the course of his employment with the respondent.

I also find that claimant's injury caused internal physical harm to his body that required medical services and resulted in disability and that he has offered objective medical evidence establishing an injury. When claimant sought medical treatment from Dr. Bertram, Dr. Bertram recorded in his office notes of May 27, 2006 that back spasms were present. A subsequent MRI scan was read by Dr. Kendrick as showing a disc

herniation with nerve root entrapment or at least nerve root irritation at the L4-5 level. A second MRI scan performed in January 2006 also revealed a disc herniation at the L4-5 level. Based upon this evidence, I find that claimant has satisfied the requirement that the injury caused internal physical harm to his body which required medical services or resulted in disability and the objective medical evidence requirement.

Finally, I also find that claimant has met his burden of proving by a preponderance of the evidence that the gradual onset injury was the major cause of his disability or need for medical treatment. Although the claimant admitted that he had suffered from some back pain prior to his employment with the respondent, claimant testified that this was normal back pain caused by the manual labor jobs he performed. Significantly, claimant testified that he had never sought medical treatment for his back pain and there is no medical evidence contradicting that testimony.

Accordingly, for the foregoing reasons, I find that claimant has met his burden of proving by a preponderance of the evidence that he suffered a compensable gradual onset injury to his low back while employed by the respondent.

At the time of the pre-hearing conference the respondent raised as an issue the question of whether claimant was an employee of the respondent at the time of an alleged injury on May 5, 2005. Respondent contended that claimant's employment had been terminated on May 4, 2005, and that he had been re-hired on May 13, 2005; therefore, any injury on May 5, 2005 would not have occurred at work. I find that claimant was an employee of the respondent at the time of his injury. First, claimant did not contend that he suffered a specific injury to his low back on May 5, 2005. Instead, claimant testified that he suffered a gradual onset injury to his back as a result of his job activities with the respondent beginning in April 2005. While the claimant did testify to a subsequent event of his back popping while lifting soda at Wal-Mart, claimant did not provide a specific date for that occurrence. Dr. Bertram's report does indicate that the date of this occurrence

was May 5, 2005. However, there was no evidence presented at the hearing indicating that claimant was terminated from the respondent on May 4, 2005 and rehired on May 13, 2005. Instead, the evidence at the hearing indicates that claimant became employed by the respondent in early April 2005 and continued his employment until May 24, 2005.

Accordingly, I find that claimant was an employee of the respondent at the time of his gradual onset back injury.

I also find that claimant is entitled to temporary total disability benefits beginning July 19, 2005 and continuing through a date yet to be determined. In order to be entitled to temporary total disability benefits claimant has the burden of proving by a preponderance of the evidence that he remained within his healing period and that he suffered a total incapacity to earn wages. *Arkansas State Highway Transportation Department v. Breshears*, 272 Ark. 244, 613 S.W. 2d 392 (1981). In this particular case, while claimant may have remained within his healing period from the date he initially sought medical treatment with Dr. Weum on May 20, 2005, I find that claimant did not suffer a total incapacity to earn wages until July 19, 2005. Claimant originally sought medical treatment from Dr. Weum beginning May 20, 2005 and continued to do so through May 29, 2005. Dr. Weum's medical reports do not indicate that he took claimant off of work. Claimant subsequently came under the care of Dr. Bertram on May 27, 2005. By this time claimant had already ceased his employment with the respondent. However, Dr. Bertram indicated that claimant could return to work with restrictions of lifting no more than 10 pounds. Dr. Bertram's subsequent medical report of June 21, 2005 continued those same work restrictions.

Claimant eventually came under the care of Dr. Kendrick, orthopaedic surgeon, on July 5, 2005. Dr. Kendrick's medical reports of July 5, July 12, and July 19 make no mention of the claimant's ability to work with or without restrictions. However, on July 19, 2005 Dr. Kendrick wrote a letter indicating that he was treating claimant conservatively and

that any type of physical activity would aggravate claimant's condition and hamper his recovery. He also noted that physical activity would increase the likelihood of claimant needing a second MRI and possible surgical intervention. Finally, Dr. Kendrick stated: "I will be happy to release him as soon as he has shown sufficient recovery that he is capable of doing it." I have interpreted Dr. Kendrick's letter as indicating that claimant is suffering a total incapacity to earn wages since he is indicating that any physical activity would aggravate claimant's condition and hamper his recovery. I also note that Dr. Kendrick on October 27, 2005 completed a form indicating that claimant was to remain off work.

Based upon the foregoing evidence, I find that claimant is entitled to temporary total disability benefits beginning July 19, 2005 and continuing through a date yet to be determined. Respondent is entitled to a credit for any temporary total disability benefits paid for the period subsequent to July 19, 2005.

With respect to this issue, I also note that claimant testified that at one point he did attempt to perform some work for his pastor. Claimant testified that over the course of a month he worked perhaps a total of approximately one week. According to claimant's testimony, his pastor allowed him to work if he was able and he did not have to work if he was unable. Based upon this evidence, I find that respondent is entitled to a credit for any wages claimant received during this period of time.

Finally, I note that respondent is liable for payment of all reasonable and necessary medical treatment provided in connection with claimant's compensable injury. This will include any reasonable and necessary medical treatment provided by Dr. Kendrick in the future.

Because claimant's compensable injury occurred after July 1, 2001, the claimant's attorney fee is governed by the amendments made by the Arkansas General Assembly in 2001. Pursuant to A.C.A. §11-9-715(a)(1)(B), claimant's attorney is entitled to an attorney

fee in the amount of 25% of the compensation for indemnity benefits payable to the claimant. Thus, claimant's attorney is entitled to a 25% attorney fee based upon the temporary total disability benefits awarded. This fee is to be paid one-half by the carrier and one-half by the claimant. Also pursuant to A.C.A. §11-9-715(a)(1)(B), an attorney fee is not awarded on medical benefits.

AWARD

Claimant has met his burden of proving by a preponderance of the evidence that he suffered a compensable gradual onset injury to his low back while working for the respondent. Claimant is entitled to temporary total disability benefits beginning July 19, 2005 and continuing through a date yet to be determined with respondent entitled to a credit for any benefits paid subsequent to July 19, 2005 and for any wages claimant earned from his pastor. Respondent is also liable for all reasonable and necessary medical treatment provided in connection with claimant's compensable low back injury. Finally, respondent has controverted claimant's entitlement to all unpaid indemnity benefits.

Pursuant to A.C.A. §11-9-715(a)(1)(B), claimant's attorney is entitled to an attorney fee in the amount of 25% of the compensation for indemnity benefits payable to the claimant. Thus, claimant's attorney is entitled to a 25% attorney fee based upon the temporary total disability benefits awarded. This fee is to be paid one-half by the carrier and one-half by the claimant. Also pursuant to A.C.A. §11-9-715(a)(1)(B), an attorney fee is not awarded on medical benefits.

All sums herein accrued are payable in a lump sum without discount and this award shall bear interest at the maximum legal rate until paid.

IT IS SO ORDERED.

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE