

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F504518

JONATHAN JORDAN	CLAIMANT
HOME DEPOT, INC.	RESPONDENT
AMERICAN HOME ASSURANCE, INSURANCE CARRIER	RESPONDENT

OPINION FILED OCTOBER 27, 2006

Hearing before ADMINISTRATIVE LAW JUDGE MICHAEL L. ELLIG, in Springdale, Washington County, Arkansas.

Claimant represented by EVELYN BROOKS, Attorney, Fayetteville, Arkansas.

Respondents represented by EMILY NEAL, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above styled claim on July 31, 2006, in Springdale, Arkansas. The deposition of the claimant was taken on June 27, 2006, and has been admitted as Claimant's Exhibit No. 3. The deposition of Dr. Cyril Raben was taken on July 18, 2006, and has been admitted as Claimant's Exhibit No. 4.

By agreement of the parties, the claimant underwent an independent medical evaluation by Dr. J. Michael Calhoun, subsequent to the hearing. Also, by agreement of the parties, the September 21, 2006 report of Dr. Calhoun, has been admitted subsequent to the hearing, as Joint Exhibit No. 1.

A pre-hearing order was entered in this claim on May 22, 2006. This pre-hearing order set out the stipulations offered by the parties and outlined the issues to be litigated and resolved at the present time. Immediately prior to the commencement of the hearing, the parties announced that they had agreed on the

appropriate weekly compensation rate of \$137.00 for both total and permanent partial disability benefits. A copy of the pre-hearing order with this amendment noted thereon was made Commission's Exhibit No. 1 to the hearing.

The following stipulations were offered by the parties and are hereby accepted:

1. On or about September 27, 2003, the relationship of employee-employer-carrier-TPA existed between the parties.
2. The appropriate weekly compensation benefits are \$137.00 for total disability and \$137.00 for permanent partial disability.
3. On or about September 27, 2003, the claimant sustained a compensable injury to his lower back.
4. There is no dispute over medical expenses incurred through August 27, 2004, and a single visit to Dr. Raben on March 28, 2006.
5. There is no dispute over the payment of temporary total disability through July 14, 2004.

By agreement of the parties, the issues to be litigated and resolved at the present time were limited to the following:

1. The claimant's entitlement to additional medical services after August 27, 2004.
2. The claimant's entitlement to additional temporary total disability benefits from July 15, 2004 through a date yet to be determined.

3. Appropriate attorney's fees.

In regard to these issues, the claimant contends:

"Claimant was injured on September 22, 2003. His lower back was injured when he was installing racking at his job at Home Depot."

In regard to these issues, the respondents contend:

A. Respondents contend that they have paid all properly submitted medical treatment and evaluation expenses. If the claimant contends any other expenses should be paid by respondents, he should specify these expenses forthwith.

B. Respondents have authorized the lumbar MRI and EMG/NCV testing recommended by Dr. Raben.

C. Respondents contend the claimant is not entitled to additional temporary total disability benefits, because the claimant reached MMI on July 14, 2004, and returned to work thereafter.

DISCUSSION

I. ADDITIONAL MEDICAL SERVICES

The first issue to be addressed concerns the claimant's entitlement to additional medical services, after August 27, 2004. The evidence presented shows that the additional medical services in dispute consist of a repeat MRI study of the lumbar spine, a psychiatric or psychological evaluation, and a possible cervical fusion. These services were recommended by Dr. Cyril Raben, following his evaluation of the claimant on March 28, 2006.

At the request of the respondents, the claimant was subsequently evaluated by Dr. Michael Calhoun, a neurosurgeon in North Little Rock, Arkansas. Dr. Calhoun concurred that the additional services recommended by Dr. Raben were medically appropriate and reasonably necessary to treat or alleviate the

claimant's lumbar and radicular symptoms. It must also be noted that, as early as August 27, 2004, Dr. Kelly R. Danks had opined that the claimant would likely require surgical intervention, in the form of a fusion, to relieve his continuing lumbar and radicular symptoms. Dr. Danks is a board certified neurosurgeon and was for a brief period of time, the claimant's authorized treating physician (such authorization was withdrawn by the respondents shortly after Dr. Danks mentioned the possibility of surgery).

Thus, the overwhelming weight of the evidence shows that the additional medical services recommended by Dr. Raben, including a possible lumbar fusion are reasonable and medically appropriate to treat the claimant's continuing lumbar and radicular symptoms. However, the question remains as to whether the claimant's continuing lumbar and radicular symptoms are causally related to his admittedly compensable lower back injury of September 27, 2003. The claimant contends that his continuing symptoms are causally related to this compensable injury. The respondents argue that the claimant's compensable injury of September 27, 2003, was merely in the form of a muscle strain or sprain that completely resolved prior to mid 2004. The respondents further agree that any continuing difficulties with the claimant's back or lower extremities, were solely the result of his pre-existing spondylolysis and spondylolisthesis or by injuries occurring to this portion of his body either prior to or subsequent to the employment related accident of September 27, 2003.

Clearly, to some extent, the claimant was experiencing spondylolysis and spondylolisthesis prior to the employment related accident of September 27, 2003. In his testimony, the claimant conceded that he had experienced an episode of difficulties with his back, some years prior, while he was playing high school basketball. However, he stated that these symptoms resolved after only one chiropractic visit and that he had not experienced low back difficulties after this visit. There is no evidence of any medical treatment of the claimant for difficulties with his back or radicular difficulties with his legs prior to September 27, 2003.

In support of their position that the claimant was experiencing chronic back difficulties prior to the accident of September 27, 2003, the respondents offer a "witness statement," purportedly taken from a co-employee (Respondents' Exhibit No. 2). This relates that the claimant complained to this co-employee of "back pain throughout the day" of September 27, 2003, even prior to the employment related accident. However, this statement also states that the claimant specifically complained of an increase in back pain and symptoms following the lifting incident with the shelving on September 27, 2003.

The respondents also offer the testimony of the claimant's department supervisor, John Ash. Mr. Ash testified that he was familiar with the claimant and had talked with the claimant "lots of times." However, there was only one time where he recalled the claimant complaining of difficulties with his back. He testified that the claimant attributed these difficulties to "playing paint

ball or war games.” Mr. Ash further acknowledged that the claimant had been employed by the respondent for approximately one year prior to the accident and that the claimant’s employment position required strenuous activities, including heavy lifting. He stated that the claimant did a good job, did everything he was asked to do, and (to his knowledge) missed no work due to back or leg difficulties prior to September 27, 2003.

Even if the claimant did complain with his back on one or even three occasions, prior to the accident on September 27, 2003, there is no indication that these complaints were of the type or magnitude of his symptoms after this additional injury to his lower back in this employment related accident. There is no evidence that prior to this accident the claimant experienced any radicular symptoms from nerve compression. There is also no evidence that these prior symptoms required any medical services, except one chiropractic visit. The claimant also was physically capable of performing strenuous activities that would place considerable stress on his lumbar spine without complaint, including his employment activities for this respondent.

At the hearing, the claimant denied that he complained of difficulties with his back to a co-employee on September 27, 2003, prior to the work-related accident. I have not had the opportunity to view the co-employee during his statement. I have, however, had the opportunity to view the claimant when he refuted this statement. I find the claimant’s testimony to be credible.

The respondents also point to the gap in the claimant's treatment, from August of 2004 until March of 2006, to imply that some "new" injury or independent intervening cause of the claimant's back or radicular symptoms must have occurred during this interval. However, there is absolutely no direct evidence of such a "new injury" or truly independent intervening event. Although subsequent MRI studies show an increase in the spondylolisthesis or "slipping" of the L5 on the S1 vertebra, Dr. Raben attributes this to merely a natural progression of the compensable aggravation of September 27, 2003 (D.23). I find that the claimant's explanation for this hiatus in his treatment to be more reasonable and supported by the evidence presented.

It appears that the respondents initially authorized the claimant to receive medical treatment for the compensable back injury from Dr. Curt Johnson, a chiropractor. After several months of chiropractic treatment, the claimant had received no significant or lasting benefit in the resolution of his back and radicular various complaints. A peer review performed at the request of the respondents indicated that further chiropractic treatment would likely be of no benefit and recommended an orthopaedic or neurosurgical evaluation. The respondents then began to provide the claimant with treatment by Dr. Carl Kendrick, an orthopaedist. Dr. Kendrick attempted to treat the claimant only by the use of exercises. In July of 2004, Dr. Kendrick returned the claimant to work. Although the claimant returned to work his symptoms continued and were not alleviated by the treatment of Dr. Kendrick.

The claimant requested to be sent to another doctor. The respondents then sent the claimant to Dr. Kelly Danks, a neurosurgeon. When Dr. Danks mentioned the possibility of surgical intervention, the respondents withdrew their authorization for Dr. Danks to continue to treat the claimant. The claimant was informed that if he desired any further treatment he must receive it from Dr. Kendrick. The claimant testified that he saw no reason to return to Dr. Kendrick, as his services had not been beneficial. He stated that he was financially unable to obtain treatment elsewhere, until he was able to see Dr. Raben.

The greater weight of the medical evidence presented shows that the claimant's compensable back injury of September 27, 2003, was more than a simple muscle strain or sprain. In his deposition, Dr. Raben stated that, based upon the description of the accident given him and the history of the onset and continuation of the claimant's symptoms, it was his opinion that the employment related accident of September 27, 2003 aggravated or worsened the claimant's pre-existing spondylolisthesis and spondylolysis and that it was the probable or likely cause of the disc derangement noted at the L5-S1 level (D.9 and D.24). In his deposition, Dr. Raben goes on to explain the actual mechanics of this aggravation or worsening of the claimant's pre-existing spondylolisthesis and spondylolysis (D. 9-10) and gives the reason for his conclusion that the accident played a causal role in the documented disc derangement (D. 9). Even Dr. Kendrick expressed the opinion that the claimant's accident of September 27, 2003, had resulted in a

Lumbar strain or sprain that was “superimposed” on his pre-existing spondylolisthesis (Claimant’s Exhibit No. 1, page 62). Dr. Danks was also of the opinion that the employment related accident of September 27, 2003, had aggravated the claimant’s pre-existing spondylolysis and spondylolisthesis. In his report of August 27, 2004, he stated:

“It is true that this (spondylolysis and spondylolisthesis at L5-S1) was very probably present prior to his injury; however, it is not unusual for these to become symptomatic after an injury. I gave him some Celebrex to try for his discomfort and we discussed his options. My experience with these is that they do not tend to get better with time and at some time in the future surgical treatment will need to be considered.” (Claimant’s Exhibit No. 1, page 81).

Finally, it is clearly the expert opinion of Dr. Calhoun that the compensable injury of September 27, 2003 aggravated the claimant’s pre-existing spondylolysis and spondylolisthesis bringing on his chronic complaints and necessitating the treatment recommended by Dr. Raben. In his report of September 21, 2006, he states:

“I have reviewed the deposition of Dr. Raben. In essence, he states when I have found to be true as well. Even though the spondylolisthesis was pre-existing, Mr. Jordan had no problems prior to the axial loading incident in 2003. Thus, even though it did not cause the spondylolisthesis it appears to have caused it to become symptomatic.”

The facts relied upon by Dr. Raben, Dr. Calhoun, Dr. Kendrick, and Dr. Danks are supported by the greater weight of the evidence presented. This included the mechanics of the stress produced by the claimant’s accident on September 27, 2003, his lack of symptoms

at the time of this accident and his continuing chronic symptoms thereafter.

Therefore, I find that the greater weight of the evidence proves that the employment related accident of September 27, 2003 caused an aggravation of the pre-existing spondylolysis and spondylolisthesis and was the likely cause of his central disc herniation of the L5-S1 disc. The greater weight of the credible evidence presented further proves that the claimant's subsequent chronic low back and radicular symptoms are being produced by the aggravation of his spondylolysis and spondylolisthesis at L5-S1, and his discal injury of the L5-S1 intervertebral disc. Finally, I find that the medical services recommended by Dr. Raben, Dr. Calhoun, and Dr. Danks are necessitated by and are medically appropriate for the claimant's chronic low back and radicular symptoms resulting from the compensable injury of September 27, 2003.

II. TEMPORARY TOTAL DISABILITY BENEFITS

The next issue concerns the claimant's entitlement to additional temporary total disability benefits for the period beginning July 15, 2004, and continuing through a date yet to be determined. The burden rests upon the claimant to prove his entitlement to these benefits. In order to meet this burden, he must show that he continued within his healing period from the effects of the compensable injury of September 27, 2003, and also continued to be rendered totally disabled from performing regular gainful employment as a result of the effects of this injury.

The issue of the duration of the healing period is a medical question, which must be resolved on the basis of the greater weight of the medical evidence presented. The healing period ends when the claimant has achieved the maximum benefit of time and medical treatment in regard to the healing or stabilization of the underlying physical damage caused by the compensable injury. Once this underlying physical damage resolves or at least stabilizes, then the healing period has ended and the mere continuation of chronic symptoms is not sufficient to extend it.

In the present case, the medical evidence presented overwhelmingly establishes that the claimant has not achieved the maximum benefit of time and medical treatment in the resolution or stabilization of the actual physical damage caused by the compensable injury. It is the expert opinion of two neurosurgeons and an orthopaedic surgeon that further treatment, including likely surgical intervention, is necessary to stabilize the physical damage to the claimant's lumbar spine and to reduce the chronic symptoms he has experienced, as a result of the compensable injury of September 27, 2003. Therefore, the claimant has satisfied the first requirement for his entitlement to the additional temporary total disability benefits he now seeks.

In regard to actual disability, the evidence shows that the claimant is 24 years old. He is a high school graduate with approximately two years of college. He has had no specific technical or vocational training. His prior work experience consists of a construction labor, minor research work for the

University of Arkansas Agricultural Department, nursery or greenhouse work, and as a hardware clerk for the respondent. Most of the claimant's periods of employment have been relatively brief (six months or less).

The claimant testified that he had not worked since mid 2004, when he ceased the light duty position he had been provided by the respondent. His explanations for such action appears to be that he was in too much pain. The claimant testified that he was physically unable to perform almost any type of physical activity and was required to alternately sit, stand, and rest or recline.

Although there is no indication that the claimant was medically restricted from engaging in employment, prior to seeing Dr. Raben in March of 2006, such medical restriction was clearly anticipated by Dr. Danks in August of 2004. In his report of August 27, 2004, Dr. Danks states:

"I have discussed with him (the claimant) that if the pain becomes too disabling we could proceed with surgery. We went over the surgical procedure and went over the anatomical model with him. He will return to see me."

Unfortunately, the claimant was not allowed to return to Dr. Danks.

Clearly, the Act does not require an injured employee to work in significant pain. In determining "disability" (unlike permanent physical impairment) subjective factors, such as pain, can be properly considered. In this regard, I found that the claimant's testimony concerning the magnitude and debilitating effect of his chronic pain to be credible. I would note that such chronic pain would reasonably be consistent with the nature and magnitude of the

objectively documented defects involving the claimant's lumbar spine. I would also note that the claimant's inability to obtain regular gainful employment would be substantially impacted, not only by his chronic pain complaints and physical limitations, but also with a looming possibility of further damage without the recommended stabilization of the claimant's spondylolysis. After consideration of all the evidence presented, it is my opinion that the greater weight of the credible evidence established that the claimant was also rendered totally disabled from performing all forms of regular gainful employment for which he would otherwise be qualified by his compensable injury of September 27, 2003, from the cessation of his employment with the respondent through a date yet to be determined. Thus, the claimant has satisfied the second requirement for his entitlement to additional temporary total disability benefits.

In summary, I find that the claimant has proven his entitlement to additional temporary total disability benefits from the date following his cessation of employment with the respondent in mid 2004, through a date yet to be determined. The specific starting date for this period of additional temporary total disability can (hopefully) be agreed upon by the parties upon review of the personnel and payroll records maintained on the claimant by this respondent. If the parties are unable to reach such an agreement, a determination will be made on the specific starting date by this Commission, upon receipt of the appropriate personnel and payroll records.

In reaching this decision, I am aware that the claimant's period of temporary total disability may have been unnecessarily extended by his failure to receive appropriate medical treatment. However, such failure is due more to the conduct of the respondents, rather than the claimant. The respondents should not be allowed to benefit by their failure to meet the duty imposed upon them by Ark. Code Ann. §11-9-508 (to timely provided reasonably necessary medical services).

FINDINGS OF FACT & CONCLUSIONS OF LAW

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

2. On September 27, 2003, the relationship of employee-employer-carrier existed between the parties.

3. On September 27, 2003, the claimant earned wages sufficient to entitle him to weekly compensation benefits of \$137.00 for both total disability and permanent partial disability.

4. On September 27, 2003, the claimant sustained a compensable injury to his lower back or lumbar spine in the form of an aggravation of his pre-existing spondylolysis and spondylolysis and a disc derangement of the L5-S1 intervertebral disc.

5. There is no dispute over the medical expenses incurred through August 27, 2004, and a single visit to Dr. Raben on March 28, 2006.

6. The medical services provided and recommended by Dr. Raben for the claimant's lumbar and radicular difficulties, including possible surgical intervention, represent reasonably necessary

medical services for the claimant's compensable lower back or lumbar injury. Such services were necessitated by or connected with this compensable injury, are medically appropriate, and have a reasonable expectation of accomplishing their intended purpose or goal.

7. There is no dispute over the claimant's entitlement to temporary total disability benefits through July 14, 2004. All appropriate temporary total disability benefits accruing during this period have previously been paid by the respondents.

8. The claimant is entitled to additional temporary total disability benefits for the period commencing with the cessation of his employment with the respondent in mid 2004, but not prior to July 15, 2004, and continuing through a date yet to be determined. The claimant has proven by the greater weight of the credible evidence that during this period he has continued within his healing period from the effects of his compensable low back or lumbar injury and has also been totally disabled from regularly gainful employment was a result of the effects of this compensable injury.

9. The respondents have controverted the claimant's entitlement to any additional temporary total disability benefits accruing after July 14, 2004.

10. A reasonable fee for the claimant's attorney is the maximum statutory attorney's fee on the additional controverted temporary total disability benefits herein awarded.

ORDER

The respondents shall pay to the claimant additional temporary total disability benefits for the period commencing of his cessation of his employment with the respondent in mid 2004, but in no event prior to July 15, 2004. These additional temporary total disability benefits shall continued until a date yet to be determined.

The respondents shall be liable for the expense of the medical services rendered and recommended to the claimant by Dr. Cyril Raben, including possible surgical intervention. This liability is 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 additional temporary total disability benefits herein awarded. One-half of this fee is to be in addition to these benefits. The remaining one-half of this fee is to be withheld from these benefits.

All benefit 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