

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F509394

JOSE MARTINEZ	CLAIMANT
OZARK CONCRETE	RESPONDENT
WESTPORT INSURANCE CORPORATION INSURANCE CARRIER	RESPONDENT

OPINION FILED OCTOBER 19, 2006

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

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

Respondent represented by MICHAEL MAYTON, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held on July 24, 2006 in Springdale, Arkansas.

The deposition of the claimant was taken on June 21, 2006 and was admitted as Claimant's Exhibit No. 2. A pre-hearing conference was previously held in this claim, and as a result thereof, a pre-hearing order was entered in the claim on April 17, 2006. This pre-hearing order set forth the stipulations offered by the parties, the issues to be litigated and resolved at the present time. Prior to the commencement of the hearing, the parties announced that they could now agree on the appropriate weekly compensation rate. The parties further added the issue of whether the claimant sustained a compensable injury to his right shoulder in the employment related accident on August 11, 2005, and the claimant's entitlement to the payment of medical expenses incurred for treatment of the right shoulder difficulties. A copy of the Prehearing Order with these amendments noted thereon was made Commission's Exhibit No. 1 to the hearing.

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 August 11, 2005, the relationship of employee-employer-carrier existed between the parties.
3. The approximate weekly compensation benefits are \$390.00 for total disability and \$293.00 for permanent partial disability.
4. On August 11, 2005, the claimant sustained a compensable injury to his back.
5. There is no dispute over the payment of medical expenses incurred through the initial evaluation of Dr. Raben.
6. There is no dispute over temporary total disability benefits accruing through December 22, 2005.

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 by Dr. Raben for the claimant's compensable back injury.
2. Whether the claimant also sustained a compensable injury to his right shoulder on August 11, 2005.
3. The claimant's entitlement to medical services for his right shoulder difficulties.
4. The claimant's entitlement to continuing temporary total disability from December 23, 2005 through a date yet to be determined.
5. Attorney's fee.

In regard to these issues, the claimant contends:

1. Claimant was injured on August 11, 2005. His lower back and right shoulder were injured when he fell while performing his work duties.

In regard to these issues, the respondent contends:

1. All benefits to which the claimant is entitled have been paid and have not been controverted.
2. The claimant is not entitled to any additional benefits.
3. The treatment suggested by Dr. Raben is not a reasonable and necessary medical expense.
4. The claimant has been released to return to work with no permanent impairment rating and no restrictions by Dr. Blankenship.

DISCUSSION

I. COMPENSABILITY OF CLAIMANT'S RIGHT SHOULDER DIFFICULTIES.

The first issue to be addressed concerns the question of whether the claimant also sustained a "compensable injury" to his right shoulder in the specific employment related incident of August 11, 2005. The burden rests on the claimant to prove all of the elements necessary to establish such a "compensable injury."

The first of these essential elements is contained in Ark. Code Ann. §11-9-102 (4)(B). This subsection requires that the claimant prove by medical evidence the actual existence of a physical injury to his right shoulder. It further requires that the actual existence of this physical injury be confirmed or supported by "objective findings", as defined by Ark. Code Ann. §11-9-102 (16)(A)(i).

After consideration of all the evidence presented, it is my opinion that the claimant has failed to prove the actual existence of a physical injury to his right shoulder that is supported by "objective evidence." Although the medical evidence

mentions complaints involving the claimant's upper back in the area of his shoulder blades and specifically the claimant's right shoulder itself, there is absolutely no evidence presented of any "objective findings" to support a physical injury to this portion of the claimant's body. There are no noted radiographic abnormalities. The claimant's physical examinations and evaluations have failed to note any discoloration, swelling, fluid accumulation, muscle spasms, or any other visible defects in this area.

As the claimant has failed to prove the essential elements of Ark. Code Ann. §11-9-102 (4)(B), in regard to a physical injury to his right shoulder, he has failed to prove the occurrence of a "compensable injury" to this portion of his body. He would not be entitled to any benefits under the Act for this alleged injury.

II. **ADDITIONAL MEDICAL SERVICES FOR THE CLAIMANT'S COMPENSABLE LOW BACK INJURY.**

The next issue concerns the claimant's entitlement to additional medical services, which have been recommended by Dr. Cyril Raben. Dr. Raben is the claimant's current treating physician, as the claimant was apparently granted a change of physician from Dr. Blankenship to Dr. Raben on or about January 19, 2006.

The respondent dutifully paid for the initial evaluation of the claimant by Dr. Rabin. This evaluation appears to have taken place on February 23, 2006. Following his evaluation of the claimant, Dr. Raben recommended a "provocative discography" of the bottom three lumbar vertebrae in the claimant's spine. He indicated that any further treatment would be based upon the findings of this test.

In order to be entitled to this recommended test, the claimant must prove by the greater weight of the credible evidence that it constitutes "reasonably necessary medical services" for his compensable injury. In order to meet this burden, the claimant must show that the recommended testing was necessitated by or connected with his compensable lumbar injury and has a reasonable expectation of accomplishing

the purpose or goal for which it is intended (i.e., to accurately diagnosis the cause or etiology of the claimant's back complaints).

A review of the medical evidence indicates that the test recommended by Dr. Raben had previously been recommended by Dr. James Blankenship, when he was the claimant's treating physician (see report of December 15, 2005 - Claimant's - Exhibit No. 1, Page 21). At that time, Dr. Blankenship was of the opinion that the claimant's complaints were likely caused by a disc protrusion at L4-L5 that had previously been noted on two MRI studies. However, Dr. Blankenship subsequently changed his mind concerning the cause of the claimant's complaints. This followed a Functional Capacity Evaluation (FCE) that was conducted on December 20, 2005 (Respondent's Exhibit No. 1, Pages 8-22). In his report of December 22, 2005, Dr. Blankenship stated that due to the "inconsistent effort demonstrated with many inconsistencies with inappropriate illness responses" shown by the FCE, it was now his opinion that the claimant's lower back difficulties were merely the result of a strain and that the defect at L4-L5 represented an incidental finding that was due to degenerative disc disease and desiccation rather than a traumatic injury resulting from the incident on August 11, 2005. Dr. Blankenship appears to further indicate that the claimant had reached maximum medical improvement or the end of his healing period from the work related strain, that no further medical services offered a reasonable expectation of improvement, and that the incident of August 11, 2005 had resulted in no permanent physical impairment.

Clearly, both Dr. Blankenship and Dr. Raben are Board Certified physicians. Dr. Blankenship is Board Certified in Neurosurgery and Dr. Raben in Orthopedic Surgery. A substantial portion of the practice of both of these physicians involves the diagnosis and treatment of back injuries and conditions.

Clearly, the objectively documented defect at L4-L5 could reasonably be the cause of the claimant's complaints. As noted by both Dr. Blankenship and Dr. Raben, the claimant's complaints and clinical findings were consistent with such a defect. It is also possible that the claimant's symptoms could represent simply myofascial pain syndrome from a chronic muscular strain or sprain. It is further reasonably possible that the discal defects noted on the MRI studies could have been produced by a specific incident of trauma, such as the employment related incident of August 11, 2005. On the other hand, these defects could simply be the result of natural and progressive degenerative changes. It is important to note that the specific tests recommended by Dr. Raben would conclusively resolve all of these possibilities. This test would either establish or eliminate the defect to the lumbar disc as the cause of the claimant's symptoms. This test would show whether the objectively documented discal damage was the result of a specific traumatic event or simply progressive degeneration of the disc.

Clearly, the claimant sustained a compensable injury to his lower back or lumbar spine. Reasonably necessary medical services would include those services reasonably necessary to determine the nature and extent of this compensable injury. It is my opinion that the test recommended by Dr. Raben, in the form of a discography, has a reasonable expectation of accomplishing this purpose and represents a reasonably necessary medical service under the provisions of Ark. Code Ann. §11-9-508. Pursuant to the provisions of this subsection, the respondent is liable for the expense of this service subject to the medical fee schedule established by this Commission.

III. **ADDITIONAL TEMPORARY TOTAL DISABILITY BENEFITS FOR THE CLAIMANT'S COMPENSABLE BACK INJURY.**

The next issue concerns the claimant's entitlement to additional temporary total disability benefits from December 23, 2005 to a date yet to be determined for his

compensable low back injury. Again, the burden rests upon the claimant to prove that during this period of time he continued within his healing period from the effects of his compensable low back injury and continued to be rendered totally disabled from performing all forms of regular gainful employment as a result 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 continues until the claimant has achieved the maximum benefit of time and medical treatment in regard to the resolution of the actual physical damage caused by the compensable injury. Once this underlying physical damage resolves or at least stabilizes, at a level that nothing further in the way of time or medical treatment offers a reasonable expectation of improvement of the physical damage, then the healing period has ended. The mere continuation of chronic symptoms is not sufficient, in and of itself, to extend the healing period.

If Dr. Blankenship is correct in his assessment that the claimant's lower back difficulties and complaints are simply the result of a chronic musculoligamentous strain or sprain and that the discal defect is merely an incidental finding, then he would also appear to be correct in his determination that the claimant's compensable back injury had stabilized and that nothing further in the way of medical treatment or time would be of benefit. Dr. Raben does not appear to disagree with this reasoning. Rather, it appears that it is simply his opinion that the additional diagnostic tests, in the form of a discogram, would be reasonable and medically appropriate to either confirm or refute Dr. Blankenship's initial conclusion as to the actual etiology of the claimant's complaints. It is obvious from Dr. Raben's records that he cannot state within a reasonable degree of medical certainty that the claimant's lower back difficulties have a discal etiology and reasonably require further medical services to improve or resolve such discal damage.

While the medical evidence presented is sufficient to cause the additional medical testing to be reasonably necessary, it falls short of proving that the claimant has actually continued within his healing period from the effects of his compensable injury after December 23, 2005. In order to be entitled to additional temporary total disability benefits, the burden is on the claimant to prove by a preponderance of the evidence that he has actually continued within his healing period from the effects of the compensable injury. It is not on the respondent to prove by a preponderance of the evidence that the healing period has ended. Where the evidence presented only shows that it is reasonably possible, but not probable, that the claimant's healing period continues, then the claimant has failed to meet his burden.

In regard to the matter of total disability, the evidence shows that the claimant attempted to return to his old job, but was unable to perform this position without an increase in his symptoms. Contrary to the history recited by Dr. Raben, the claimant's return to work at his previous job occurred prior to, rather than after, his final release by Dr. Blankenship. Upon his final discharge of the claimant, Dr. Blankenship returned the claimant to work with only the restriction against lifting in excess of 40 pounds.

The FCE performed on the claimant, even though it was interpreted as demonstrating less than full effort, showed that the claimant was physically capable of carrying objects up to four hours per day; pushing and pulling objects up to two hours per day; walking up to two hours per day; kneeling and crouching occasionally; repetitively reaching, handling, fingering, and feeling up to eight hours per day; sitting up to three hours per day; and standing up to three hours per day. These tests further showed that he was physically capable of lifting up to lower torso height 41.7 pounds; lifting to upper torso height 44 pounds; arm lifting 32 pounds; high near lifting up to 38 pounds; pushing out with up to 35 pounds of force; and pulling in up to 38 pounds

of force. He was also shown to be able to carry up to ten pounds and push or pull up to 40 pounds.

There is no indication that Dr. Raben reviewed the claimant's FCE. In his records he makes no specific restrictions on the claimant's potential employment activities. In his testimony, the claimant indicated that Dr. Raben had given him no verbal restrictions on his physical activities. The only evidence of Dr. Raben's opinion in this regard is contained in a rather nebulous statement made by Dr. Raben in his report of May 11, 2006, wherein he states:

"Jose, it, sounds like, had been suggested that he be off work, not only from myself, but also from Dr. Blankenship."

The claimant testified that when he was discharged by Dr. Blankenship and released to return to work with a 40 pound lifting restriction, he took this restriction to the respondent. However, the respondent did not make an employment position available to him that was within this restriction. He further testified that he had made no attempt to find employment within this restriction, elsewhere.

After consideration of all the evidence presented, it is my further opinion that the claimant has failed to prove by the greater weight of the credible evidence that any restrictions he may be experiencing on his potential employment activities, as the result of his compensable injury, have rendered him totally disabled from performing all gainful employment for which he would otherwise be qualified. In fact, it would appear that there is a substantial number of potential employment positions, within the claimant's restrictions and within the area of his residence, that would provide him with a reasonable expectation of obtaining regular gainful employment. He has simply made no attempt to find such positions. The fact that the respondent has failed to provide the claimant with suitable employment does not relieve him of the obligation of seeking employment elsewhere.

Therefore, I find that the claimant has failed to prove by the a preponderance of the evidence that he continued within his healing period from the effects of his compensable lower back injury or that he continued to be rendered totally disabled from performing all forms of regular gainful employment as a result of this injury, after December 23, 2005. The claimant's failure to prove these essential facts prevents him from being awarded additional temporary total disability benefits from December 23, 2005 to a date yet to be determined.

FINDINGS & CONCLUSIONS

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On August 11, 2005, the relationship of employee-employer-carrier existed between the parties.
3. On August 11, 2005, the claimant earned wages sufficient to entitle him to weekly compensation benefits of \$390.00 for total disability and \$293.00 for permanent partial disability.
4. On August 11, 2005, the claimant sustained a compensable injury to his lower back (lumbar spine).
5. The claimant has failed to prove that he also sustained a compensable injury to his right shoulder on August 11, 2005. Specifically, he has failed to prove by the greater weight of the credible evidence the existence of a physical injury to this portion of his body that is supported by "objective findings." Therefore, the claimant would not be entitled to any benefits under the Act for this alleged injury.

6. There is no dispute over the payment of medical expenses incurred by the claimant for treatment of this compensable low back injury through the evaluation by Dr. Cyril Raben on February 23, 2006. All such expenses have apparently been paid by the respondent.
7. The additional testing recommended by Dr. Raben, the form of a discogram, represents reasonably necessary medical services for the claimant's compensable low back injury. The greater weight of the evidence presented shows that this test is medically appropriate and reasonably necessary to determine the nature and extent of the claimant's compensable injury. Liability for the expense of these services, subject to the medical fee schedule established by this Commission, rests upon the respondent.
8. There is no dispute over the claimant's entitlement to temporary total disability benefits accruing through December 22, 2005.
9. The claimant has failed to prove that he is entitled to continuing temporary total disability benefits from December 23, 2005 to a date yet to be determined. Specifically, he has failed to prove that, during this time, he continued within his healing period from the effects of the compensable injury and continued to be rendered totally disabled from performing all forms of regular gainful employment as a result of this injury.

10. The respondent has denied the occurrence of any compensable injury to the claimant's right shoulder and has controverted his entitlement to any benefits attributable thereto. The respondent has also controverted the claimant's entitlement to any medical services after February 23, 2006 and any temporary total disability benefits after December 22, 2006.

ORDER

The Respondent shall be liable for the expense of the discogram recommended by Dr. Raben, subject to the medical fee schedule established by this Commission.

For the reasons heretofore stated, the claim for benefits attributable to an alleged right shoulder injury and for additional temporary total disability benefits are denied dismissed.

This award shall bear the maximum legal rate of interest until paid.

IT IS SO ORDERED.

MICHAEL L. ELLIG
ADMINISTRATIVE LAW JUDGE