

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F600549

JOHN SEARL	CLAIMANT
ACTION, INC.	RESPONDENT
VALLEY FORGE INSURANCE, INSURANCE CARRIER	RESPONDENT

OPINION FILED NOVEMBER 6, 2006

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

Claimant represented by TOM MICKEL, Attorney, Conway, Arkansas.

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

STATEMENT OF THE CASE

A hearing was held in this case on August 14, 2006, in Springdale, Arkansas. A pre-hearing order had been entered on June 15, 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. A copy of this pre-hearing order was made Commission's Exhibit No. 1 to the hearing.

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

1. The Arkansas workers' Compensation Commission has jurisdiction of this claim.
2. On June 6, 2005, the relationship of employee-employer-carrier existed between the parties.
3. The appropriate weekly compensation rates are \$466.00 for total disability and \$340.00 for permanent partial disability.

4. The claim is now controverted in its entirety.

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

1. whether the claimant sustained a compensable injury to his low back on June 6, 2005.
2. The claimant's entitlement to the payment of medical expenses, temporary total disability from June 6, 2005, through a date yet to be determined, and attorney's fees.

In regard to these issues, the claimant contends:

"A. Claimant contends that he sustained an admittedly compensable injury to his low back by specific incident on June 6, 2006(sic) while bending and pushing a 60 pound duct in this job as a heating/air conditioning worker. Respondents accepted this claim as compensable and paid medical and TTD benefits through 2/16/2006. Claimant sustained a documented herniated disc which is paracentral and is thus affecting his right leg, even though the MRI shows a herniation paracentrally and to the left. Claimant does have some degenerative changes in the lumbar spine but claimant contends that the major cause of his need for treatment and disability is his admittedly compensable work related injury. Respondents have refused to pay for a follow up EMG which would document whether the claimant's problems are from degeneration versus a disc herniation. Claimant contends that he is entitled to the potential surgery proposed for his low back.

B. Claimant was being paid TTD prior to it being ceased by respondents as of 2/16/2006. Claimant is still in his healing period and no physician has released him to return to work. Claimant is entitled to TTD from 2/16/2006 to a date to be determined.

C. Claimant contend that respondents have controverted this claim with respect to the benefits claimed at present. Therefore,

claimant contends he is entitled to maximum attorney's fees on all benefits awarded."

In regard to these issues, the respondents contend:

"(a) Claimant cannot prove by preponderance of the evidence that he sustained a compensable injury while working for respondent employer.

(b) Respondents will raise an "objective findings" defense under Ark. Code Ann. §11-9-102(4)(D),16(A)(i).

(c) Claimant is not entitled to an award of temporary total disability benefits.

(d) Claimant is not entitled to an award of medical benefits.

(e) Respondents are entitled to reimbursement for any temporary total disability benefits paid while claimant was employed by a successor employer."

DISCUSSION

I. COMPENSABILITY

The first issue to be addressed is the question of whether the claimant sustained a "compensable injury" to his low back or lumbar spine as the result of a specific incident on June 6, 2005. The burden rests upon the claimant to prove all of the elements necessary to prove a "compensable injury".

The first of these elements are found in Ark. Code Ann. §11-9-102(4)(D). This subdivision requires that the claimant prove by medical evidence the actual existence of the physical injury or damage alleged to be compensable. Further, the claimant must also show that the existence of this physical injury or damage is supported by "objective findings," as defined by Ark. Code Ann. §11-9-102(16)(A)(i).

The medical evidence presented clearly “establishes” the actual existence of a physical injury or damage involving the claimant’s lumbar spine, particularly in the L5-S1 area. The claimant has been diagnosed as suffering from a sacroiliac joint sprain, degenerative disc disease, and a large extruded disc herniation of the L5-S1 disc. He has further been consistently diagnosed as suffering from a radiculopathy of the right L5 and S1 nerves, resulting from compression and impingement of these nerve roots by the L5-S1 disc herniation.

The actual existence of the L5-S1 disc herniation and L5 and S1 nerve impingement with resulting radiculopathies, are clearly supported by numerous “objective findings.” These “objective findings” include visible findings noted on clinical examinations (muscle spasms, muscle atrophy, abnormal reflexes, etc.). They also include purely objective defects noted on x-ray, MRI study, and nerve velocity and conduction studies.

After consideration of the medical evidence presented, I find that the claimant has established “by medical evidence,” which is supported by objective findings, the actual existence of a physical injury to his low back or lumbar spine. The medical evidence further shows that this physical injury is in the form of a disc herniation of the L5-S1 intervertebral disc, which is causing nerve root impingement and consequently radiculopathies of the right L5 and S1 nerves. Thus, the claimant has satisfied all the statutory requirements for a “compensable injury,” which are contained in Ark. Code Ann. §11-9-102(4)(D).

The claimant must next prove that these particular physical injuries or damage satisfy all of the definitional requirements for a “compensable injury” that are contained in Ark. Code Ann. §11-9-102(4)(A)(i). These definitional requirements are:

(1) That the physical injury or damage must arise out of and occur in the course of the employment;

(2) That the physical injury or damage must be caused by a specific incident;

(3) That the physical injury or damage must be identifiable by time and place of occurrence;

(4) That the physical injury or damage has caused internal or external physical harm to the claimant’s body;

(5) That the physical injury or damage has required medical services or has resulted in disability.

In order to satisfy the first three of these definitional requirements, the claimant must prove a causal relationship between the described employment related accident or incident on June 6, 2005 and the objectively documented L5-S1 disc herniation with the resulting L5 and S1 radiculopathies. However, he need not prove that this specific employment related incident was the sole or even major cause of these particular physical injuries. Further, it is not necessary that he prove the existence of this causal relationship to an absolute or mathematical certainty. He need only prove that the existence of this causal relationship is probable or likely.

The medical evidence objectively shows that the claimant has defects in the L5-S1 area that are degenerative in nature, which to

some extent pre-existed the incident on June 6, 2005. These include degenerative disc disease, osteophyte formation, and spondylolysis. Degenerative disc disease can, in and of itself, result in generalized bulging of a disc with some loss of disc space height. It can also make a disc more susceptible to experiencing an actual rupture or herniation with even relatively minor stress or trauma. However, an actual rupture or disc herniation is generally accepted as being associated with some specific event or activity that places stress on the weakened disc. In the present case, the evidence presented clearly shows that the claimant has sustained a large rupture or herniation of the L5-S1 disc.

The claimant's MRI study further reveals the presence of degenerative arthritic changes in the form of osteophyte formation of the L5 and S1 vertebral bodies, which may be playing some role in the pressure or impingement of the L5 and S1 nerve roots. However, this same test shows that the ruptured and displaced L5-S1 disc is also encroaching or compressing on both the right and left exiting L5 and S1 nerve roots.

Clearly, the stress or trauma that would have been produced by the described employment related incident or accident of June 6, 2005, would have been sufficient to have logically produced the objectively documented herniation or rupture of the L5-S1 intervertebral disc. This would be particularly true in light of the weakened state of this disc from the pre-existing degenerative disc disease.

The likelihood of this incident being the cause of the actual disc herniation and the compression of the nerve roots sufficient to result in the right sided radiculopathy is increased by the fact that there is absolutely no evidence that the claimant had experienced any low back or radicular difficulties prior to the incident of June 6, 2005 (even though he had engaged in relatively strenuous employment activities), but experienced continuing difficulties of this nature immediately after. The claimant testified that he experienced a "pop" in his back at the time of the June 6, 2005 incident, and his pain and radicular difficulties shortly thereafter. I find the testimony of the claimant, in this regard, to be credible. I have not only considered the demeanor of the claimant when testifying at the hearing, but would also note that his description of the accident and the onset of his difficulties at the hearing coincides with all of the various histories he has related to his numerous physicians.

The greater weight of the credible evidence shows that the claimant's disc herniation and resulting radiculopathy was reasonably and logically attributable to the described employment related incident on June 6, 2005. The greater weight of the evidence further shows that the claimant initially experienced symptoms indicative of the occurrence of such a disc herniation and resulting radiculopathy within a reasonable period of time following this incident. Finally, the evidence fails to show any other more reasonable or even equally reasonable cause of his L5-S1 disc herniation and resulting radiculopathy. Under the long

established rule announced in Hall v. Pittman Construction Company, 235 Ark. 104, 357 S.W. 2nd 263 (1962), the foregoing facts are sufficient basis to support a finding of a causal relationship between the specific employment related incident of June 6, 2005 and the medically established and objectively documented injuries or defects in the form of a herniation of the claimant's L5-S1 intervertebral disc with a resulting right radiculopathy. Thus, in regard to these particular injuries the claimant has satisfied the first three definitional requirements of Ark. Code Ann. §11-9-102(4)(A)(i).

The fourth requirement of Ark. Code Ann. §11-9-102(4)(A)(i) is that the physical injury must cause internal or external physical harm to the claimant's body, either temporary or permanent. In this regard, the purely objective findings noted on the MRI and the nerve conduction and velocity studies amply show internal physical harm or damage to the L5-S1 intervertebral disc and to the claimant's exiting L5 and S1 nerves. Thus, the claimant has proven this definitional requirement.

The fifth requirement of Ark. Code Ann. §11-9-102(4)(A)(i) is that the compensable injury must require medical services or result in disability. The evidence shows that it was obviously the expert medical opinions of Dr. Shirin deSilva, Dr. John Knudsen, Dr. Dennis Estep, Dr. Brian Ipsen, and Dr. Luke Knox that the claimant's herniated disc and resulting right radiculopathy have reasonably required medical services and, in fact, continue to require medical services. Obviously, the very nature and extent of

the claimant's compensable lumbar injury would lead any reasonable person to conclude that such an injury would not resolve on its own, but would require appropriate medical treatment. As will be discussed in more detail later, the greater weight of the evidence further shows that this compensable injury has also resulted in some temporary total disability. Finally, by the very nature of the claimant's compensable injury, it will also result in some degree or percentage of permanent physical impairment (under the Commission's official rating guide, a herniated lumbar disc is assigned a specific degree of permanent physical impairment, regardless of the success or outcome of medical intervention). Thus, the claimant has clearly proven the fifth and final definitional requirement of Ark. Code Ann. §11-9-102(4)(A)(i).

In summary, I find that the claimant has established by medical evidence, which is supported by objective findings, the actual existence of a physical injury to his lumbar spine, which is in the form of a herniation of the L5-S1 disc with resulting nerve root impingement and a right sided radiculopathy. I further find that the claimant has proven by the greater weight of the credible evidence that this injury arose out of and occurred in the course of his employment with the respondent, was caused by a specific incident, is identifiable by time and place of occurrence, caused internal physical harm to the claimant's body, required and requires medical services, and resulted in disability. Thus, the claimant's herniation of the L5-S1 disc with resulting nerve root

impingement and right sided radiculopathy constitutes a “compensable injury” within the meaning of the Act.

II. BENEFITS

Under Ark. Code Ann. §11-9-508, the claimant would be entitled to reasonably necessary medical services for his compensable lumbar injury. “Reasonably necessary medical services” are those medical services that have a purpose or goal, that is connected with the compensable injury and have a reasonable expectation of accomplishing that purpose or goal at the time the services are actually rendered. These medical services would include services medically appropriate to accurately diagnose the nature and extent of the injury, to resolve, improve, or stabilize the actual physical damage caused by the injury, or to resolve or alleviate the symptoms and limitations resulting from the injury.

After consideration of all the evidence presented, I find that the medical services rendered to the claimant for his low back and right leg complaints by and at the direction of Dr. Shirin deSilva, Dr. Dennis Estep, Dr. John Knudsen, Dr. Brian Ipsen, and Dr. Luke Knox all represent medical services that were necessitated by or connected with the claimant’s compensable lumbar injury. I further find that all of these services had a reasonable expectation of accomplishing their intended purpose or goal at the time the services were actually rendered.

The evidence reveals that all of the medical services provided by these physicians, as the result of the claimant’s lower back and right lower extremity complaints, were intended either to

accurately diagnose the etiology of the claimant's complaints and the nature and extent of his compensable injury, to actually treat the physical damage caused by the compensable injury, or to alleviate or reduce the symptoms and limitations the compensable injury was producing. All of these medical services were of a type commonly recognized by the general medical community as being appropriate for these purposes. Although it appears that the medical services intended to alleviate or reduce the actual physical damage caused by the injury and to reduce or alleviate the symptoms and limitations it was producing have not been entirely successful. However, they certainly had a reasonable expectation of doing so at the time they were rendered. It is also quite likely that these medical services have, at least, acted to stabilize the damage caused by the compensable injury and/or to maintain the claimant's symptoms and limitations of their current levels.

I would note that there appears to be some controversy between the medical experts over the continuing treatment modalities currently appropriate for the claimant's compensable injury. In his report of February 9, 2006, Dr. Ipsen has recommended a lumbar fusion. In a subsequent report, dated July 13, 2006, Dr. Knox has advised against such a procedure due to possible respiratory difficulties and the claimant's ongoing smoking. However, in this regard, Dr. Ipsen is the claimant's primary treating physician. Dr. Knox has only seen the claimant on one occasion for a second opinion, apparently at the respondents' request. On this basis, I

am more inclined to accept the opinion of Dr. Ipsen. I would also note that assuming the potential risk of complications is not a matter solely within the discretion of the physician. The claimant or patient is the only one that can appreciate the true extent and effect of his present symptoms and is the one who bears the actual risk. Clearly, some consideration should be afforded to a claimant's informed decision in electing the appropriate treating modality. I would note that a surgical fusion, as recommended by Dr. Ipsen, is commonly recognized as being medically appropriate to treat injuries of the type experienced by the claimant.

Finally, there is the matter of the claimant's entitlement to temporary total disability benefits. In order to be entitled to such benefits, the claimant must prove by a preponderance of the evidence two separate facts. First, he must prove that he has continued within his healing period from the effects of his compensable injury. Secondly, he must prove that he has been rendered totally disabled from performing all forms of regular gainful employment, for which he would otherwise be qualified as a result of the effects of the compensable injury.

In the present case, the pre-hearing order reflects that the issue in dispute is the claimant's entitlement to temporary total disability benefits for the period of June 6, 2005 to a date yet to be determined. However, it is obvious from the evidence presented, including the claimant's own testimony that during a substantial portion of this period, he has actually been regularly gainfully employed. Certainly, he would not be entitled to

temporary total disability benefits during any period wherein he was regularly gainfully employed.

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. A claimant continues within his healing period from the effects of the compensable injury until he has achieved the maximum benefit of time and medical treatment in the resolution or "healing" of the actual physical damage caused by the compensable injury. Once this underlying physical damage totally resolves, or at least, stabilizes at a permanent level, where nothing further in the way of time or medical treatment offers a reasonable expectation of improvement, then the healing period has ended. The mere continuation of chronic symptoms is not sufficient, in and of itself, to extend the healing period.

The present medical evidence clearly shows that the claimant has not yet achieved the maximum benefit of medical treatment. There remains treatment modalities that clearly have a reasonable expectation of not only improving or stabilizing the actual physical damage caused by the compensable injury, but which would also be reasonable expected to reduce the claimant's symptoms, his level of discomfort and even his physical limitations. Thus, the medical evidence proves that the claimant has continued within his healing period from the effects of his compensable lumbar injury from June 6, 2005 through a date yet to be determined.

In regard to actual disability, the medical evidence shows that the claimant was initially allowed to continue employment

under certain substantial restrictions (i.e. no significant lifting, pushing, or pulling, little or no bending or twisting at the waist, no prolonged sitting, standing, or walking, and no climbing). The respondent provided the claimant with an employment position that was within these limitations. The claimant continued working in this limited or light duty position, until the particular "job" for which he had been hired was completed. Upon completion of the particular installation "job" the claimant was laid off by the respondent and was unemployed for some ten to fifteen days. At that time, he was able to obtain a position with Air Services that was within his limitations. He held this second position until December of 2005. At that time, he was laid off by the second employer. He testified that he had been unable to find an employment position that was within his restrictions after that time.

The claimant's employment history reflects that he has engaged in the fabrication and installation of heating and air-conditioning duct work for a substantial portion of his work life. Obviously, this can be a physically strenuous or demanding occupation. Generally, the ability to lift, carry, bend, stoop, crawl, and climb are activities demanded by the occupation. The claimant's compensable injury has significantly limited his abilities to perform most positions in this field. This fact coupled with the possibility of pending surgery and increased risk of further injury would make it extremely difficult for the claimant to obtain regular employment in the open job market. I would also note that

on January 5, 2006, Dr. Dennis Estep observed that the claimant had already been laid off from work but, at that time, medically restricted the claimant from engaging in any employment until after “surgical opinion and possible intervention.” There is no evidence that the claimant has been subsequently released to return to employment, in any capacity following January 5, 2006. In fact, the records of Dr. Ipsen indicate that it was also his expert opinion the claimant “cannot return to work” (Joint Exhibit No. 1, page 67 and 69). In his report, Dr. Knox made the generalized statement that he agreed with the conclusions of Dr. Ipsen in his previous reports. Dr. Knox in no way indicated that the claimant was capable of returning to any type of regular gainful employment, at the time of his evaluation.

After consideration of the evidence presented, it is my opinion that the claimant has proven by the greater weight of the credible evidence that he has been rendered actually totally disabled as a result of the effects of his compensable lumbar injury from the time he was laid off by Air Services until a date yet to be determined. Therefore, he has proven the second fact necessary to entitle him to temporary total disability benefits.

As the claimant has proven both of the necessary facts for his entitlement to temporary total disability benefits from the time he was laid off by Air Services until a date yet to be determined, he would be entitled to temporary total disability benefits at the appropriate rate during this period.

Although the respondents have expressly denied that the claimant sustained a compensable injury and now controverted this claim in its entirety, it would appear from the pre-hearing questionnaires of the parties that some temporary total disability benefits were previously paid by the respondents. Although the respondents would be liable for attorney's fee on these previously paid benefits, as a result of their subsequent controversion of the claim in its entirety, they would still remain entitled to credit for such benefits previously paid against any temporary total disability benefits herein awarded, Ark. Code Ann. §11-9-807(a).

FINDINGS OF FACT & CONCLUSIONS OF LAW

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

2. On June 6, 2005, the relationship of employee-employer-carrier existed between the parties.

3. On June 6, 2005, the claimant earned wages sufficient to entitle him to weekly compensation benefits of \$466.00 for total disability and \$340.00 for permanent partial disability.

4. On June 6, 2005, the claimant sustained a compensable injury to his low back or lumbar spine, which was in the form of a herniated vertebral disc at the L5-S1 level with a resulting right radiculopathy. The claimant has established by medical evidence, which is supported by objective findings, the actual existence of this physical injury. The claimant has further proven by the greater weight of the credible evidence that this physical injury arose out of and occurred in the course of the employment with the

respondent, 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 low back and right lower extremity complaints by and at the direction of Dr. Shirin deSilva, Dr. Dennis Estep, Dr. John Knudsen, Dr. Brian Ipsen, and Dr. Luke Knox represent reasonably necessary medical services, within the meaning of Ark. Code Ann. §11-9-508. Pursuant to the provisions of this subsection, the respondents are liable for the expense of these medical services, subject to the medical fee schedule established by this Commission.

6. The claimant has been rendered temporarily totally disabled as a result of his compensable low back or lumbar injury for the period beginning with the day following his lay off by Air Services in December of 2005, and continuing until a date yet to be determined.

7. The respondents have denied that the claimant sustained a compensable low back or lumbar injury and have controverted his entitlement to any and all benefits. However, the respondents have apparently previously paid some benefits.

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

9. The respondents are entitled to credit, under Ark. Code Ann. §11-9-807(a) for any benefits they have previously paid.

ORDER

The respondents shall pay to the claimant temporary total disability benefits for the period commencing the day following his lay off by Air Services in December of 2005, and continuing until a date yet to be determined. The respondents shall be entitled to credit for any such benefits previously paid.

The respondents shall be liable for the medical services provided to the claimant for his compensable low back or lumbar injury by and at the direction of Dr. Shirin deSilva, Dr. Dennis Estep, Dr. John Knudsen, Dr. Brian Ipsen, and Dr. Luke Knox. The respondents remain liable for additional reasonably necessary medical services provided to the claimant for his compensable low back or lumbar injury by and at the direction of Dr. Ipsen. The respondents' liability for these expenses is limited by the Commission's medical fee schedule. The respondents are also entitled to credit for any medical expenses they have previously paid.

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 to be paid by the respondents in addition to such benefits. The remaining one-half of this fee is 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.

MICHAEL L. ELLIG
ADMINISTRATIVE LAW JUDGE