

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F404386

DAVID ZOLLICOFFER	CLAIMANT
ARKANSAS VALLEY ELECTRIC	RESPONDENT
ARKANSAS RURAL ELECTRIC SELF INSURED TRUST INSURANCE CARRIER/TPA	RESPONDENT

OPINION FILED MAY 31, 2006

Hearing before ADMINISTRATIVE LAW JUDGE MICHAEL L. ELLIG in Fort Smith, Sebastian County, Arkansas.

Claimant represented by GUNNER DeLAY, Attorney, Fort Smith, Arkansas.

Respondents represented by BETTY DEMORY, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above styled claim on March 28, 2006, in Fort Smith, Arkansas. A pre-hearing order had been entered in this case on January 24, 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 Opinion of November 15, 2005, has become final and is res judicata of all issues addressed therein.

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 temporary total disability benefits from January 18, 2005 through a date

yet to be determined.

2. Appropriate attorney's fee.

In regard to these issues, the claimant contends:

"Claimant contends that as a matter of res judicata he is still in his healing period and is entitled to TTD from January 18, 2005 to a date yet to be determined."

In regard to these issues, the respondents contend:

"It is the contention of the respondents that the claimant has been paid all appropriate benefits to which he is entitled. Respondents further assert that the claimant's 10% impairment rating has been accepted and benefits are being paid toward the rating. The claimant was released to return to work by Dr. Cathey on January 18, 2005. Respondent made work available for the claimant after his release by Dr. Cathey. However, the claimant quit. Furthermore, respondents have provided claimant with additional medical benefits pursuant to the November 15, 2005 Opinion. Respondents are also awaiting a response from Dr. Blankenship regarding claimant's entitlement to additional temporary total disability benefits."

DISCUSSION

The sole issue at the present time, is the claimant's entitlement to additional temporary total disability benefits from January 18, 2005 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, the claimant must show that he continued within his healing period from the effects of his compensable injury and was also rendered totally disabled as a result of the effects of this compensable injury.

The issue of the duration of the healing period is essentially a medical question, which must be resolved upon the basis of the

greater weight of the medical evidence presented. Ark. Code Ann. §11-9-102(12) defines the healing period as that period for healing of an injury resulting from an accident. The Appellate Courts have held that the healing period continues until the claimant achieves the maximum benefit of both time and medical treatment in regard to the resolution or stabilization of the actual physical damage caused by the compensable injury. Once the underlying physical damage has resolved, or at least stabilized, at a level where nothing further in the way of either time or medical treatment offers a reasonable expectation of improvement, then the healing period has ended.

The medical record shows that the claimant was discharged from further medical treatment by Dr. Steven Cathey, his prior treating neurosurgeon, on January 18, 2005. At that time Dr. Cathey also rated the claimant's permanent impairment and released the claimant to return to full employment with no restrictions. However, only five weeks prior, on December 8, 2004, Dr. Cathey had performed a rather extensive surgery on the claimant's cervical spine. This surgery was in the form of an anterior cervical decompression of a herniated disc at C5-6 and a fusion of the C5 to the C6 vertebra utilizing a threaded allograft bone implant in conjunction with anterior spinal instrumentation. With the exception of one follow up examination and a final examination of January 18, 2005, Dr. Cathey appears to have offered no other treatment to the claimant. Although Dr. Cathey noted on his visit of January 18, 2005, that the claimant's incision had healed, and that his graft and

instrumentation was still in proper position, it is obvious that the intended fusion of the claimant's cervical vertebra had not yet occurred. In fact, the fusion had not occurred at the time the claimant was evaluated by Dr. James Blankenship some six months later on July 20, 2005. Generally, such fusions take up to a year to fully occur. I have no idea what interpretation Dr. Cathy places on the term "maximum medical improvement". However, it is clearly not synonymous with the definition of the term "healing period" given by either statute or court interpretation. Clearly, the fusion of the cervical vertebral, occasioned by the compensable injury, had not been occurred or "healed."

while the claimant may not have needed any further neurosurgical treatment, the greater weight of the evidence indicates that additional medical services remained appropriate, after January 18, 2005. On April 25, 2005, Dr. R. Lane Wilson (the claimant's family physician and apparently his initial treating physician for the compensable injury), continued to treat the claimant with oral medication. He also recommended physical therapy and a follow up neurosurgical evaluation. It appears that the respondents refused to provide the claimant with this recommended treatment.

The claimant ultimately obtained a surgical evaluation by Dr. James Blankenship, after being granted a change of physicians by this Commission. Following his evaluation, Dr. Blankenship also recommended additional medical treatment, in the form of an epidural steroid injection to the cervical spine and physical

therapy. The respondents have again apparently refused to provide these recommended treatment modalities.

After consideration of the evidence presented, it is my opinion that the greater weight of the credible evidence shows that the claimant continued within his healing period from the effects of his compensable cervical injury from January 18, 2005 through a date yet to be determined. Dr. Cathy may have been accurate in his statement that the claimant's condition was "stable" (in regard to the fact that it had not changed between the completion of the surgery on December 8, 2004, and his evaluation on January 18, 2005). However, further improvement, in the form of a solid fusion to the C5-C6 vertebra, was still contemplated, but had not yet occurred. In fact, little if any bone formation or solidification of fusion would be expected in the six weeks between the surgery and the evaluation on January 18, 2005. In addition, both Dr. Wilson and Dr. Blankenship were of the opinion that the soft tissue irritation from the compensable injury and the subsequent surgery could also be reduced with oral medications, injections, and physical therapy. While Dr. Wilson may be a general practitioner, Dr. Blankenship is a neurosurgeon with demonstrated skills and expertise at least equal to that of Dr. Cathy. The opinion of these physicians in regard to the necessity of need for additional medical services for the compensable injury after January 18, 2005).

Next, the claimant must prove by the greater weight of the credible evidence that his compensable cervical injury continued

to render him totally disabled from performing all forms of regular gainful employment for which he is otherwise qualified, after January 18, 2005.

One of the facts to consider in making this determination is the physical restrictions and limitations on the claimant's potential employment activities, as a result of the effects of his compensable cervical injury. I recognize that Dr. Cathey did not see fit to impose any restrictions or limitations on the claimant's potential employment activities. In fact, this is the first time that I have ever seen a physician take this position. Generally, it is common practice for some restrictions and limitations to be placed upon a patient's physical activities following a laminectomy and cervical fusion, particularly during the period necessary for the fusion to solidify. I also find it curious to note that in his report of January 18, 2005, Dr. Cathey recognizes the possibility that the claimant might never be physically able to perform his prior employment activities as a lineman. Although Dr. Blankenship is exceptionally careful not to contradict Dr. Cathey, he was careful to reserve his opinion concerning the appropriate physical restrictions and limitations on the claimant's potential employment activities until after the functional capacity evaluation. This evaluation was also never performed.

In my 28 years in this position, I have seen a considerable number of cases involving injuries such as that experienced by the claimant with resulting cervical laminectomies and fusions. In all of these cases, the claimant was generally medically restricted, at

least during the period necessary for the fusion to solidify, from engaging in any physical activities that required stress on the cervical spine, such as twisting, bending, or extension of the neck, holding the neck or head in a flexed position for extended periods of time, heavy lifting with the arms, prolonged extension of the arms at or above shoulder level, and repetitive lifting with the arms to or above shoulder level. It is my opinion that these restrictions are applicable here.

The record shows that the claimant attempted to return to employment with the respondent, approximately six weeks following his surgery. Although the respondent's operation manager, Stephen Holt, testified that the claimant was not immediately returned to his preinjury position as a lineman, he did not indicate what physical activities were required of the claimant. The claimant testified that he made a good faith attempt to perform the employment duties which he was assigned, but that he was physically incapable of performing these activities without increased pain. I find this testimony to be credible. The claimant also testified that he was physically capable of driving, taking care of his daughter, cooking, doing housework, and doing some yard work.

As previously indicated, the greater weight of the medical evidence shows that the claimant continued to require active medical treatment, including pain medication and physical therapy, through at least his evaluation by Dr. Blankenship in July of 2005. Such medical treatment would also interfere with the claimant's ability to perform full time employment. The evidence

shows that the claimant's inability to obtain these medical services has been due to no fault of his own. Rather, the claimant's failure to obtain appropriate treatment in a timely manner has been due to a misunderstanding by Dr. Blankenship's office, the refusal of the respondents' to authorize additional continuing appropriate medical services, and the claimant's financial inability to obtain such services on his own (this appears primarily in part to his termination by the respondent in January of 2005, and the resulting loss of group insurance).

After consideration of all the evidence presented, it is my opinion that the greater weight of the evidence establishes that the claimant's compensable cervical injury has continued to render him totally disabled, on a temporary basis, from January 18, 2005 through a date yet to be determined. This evidence shows that the claimant has not sufficiently improved to the point where he has a reasonable chance of obtaining regular gainful employment in the open job market. Therefore, the claimant has proven the two elements necessary to entitle him to continued temporary total disability benefits for his compensable cervical injury.

In reaching this decision, I am aware of the fact that both Dr. Cathey and Dr. Blankenship have opined that the claimant was physically capable of performing some type of employment. However, neither of these gentlemen are vocational experts or have any particular familiarity with the potential employment positions in the vicinity of the claimant's residence. There is also no evidence that either of these gentlemen have any information concerning the

claimant's employment skills or abilities. Finally, I would note that it is the duty and obligation of this Commission, rather than any physician, to employ its knowledge and expertise of the job market and the physical requirements of various job positions, in light of the qualifications and capabilities particularly to the claimant, to determine the question of "disability" (either temporary or permanent).

Finally, I would note that it would appear that the claimant's period of temporary total disability is being unnecessarily delayed by his inability to obtain appropriate medical treatment. Such treatment would clearly have the potential of reducing the claimant's symptoms and complaints to the point where a return to regular employment will be possible. However, the claimant's inability to obtain such appropriate treatment is in no way his fault. However it appears that the parties have now agreed on an appropriate medical provider (Dr. Brent Sprinkle). Hopefully, with the services of Dr. Sprinkle, the claimant will obtain sufficient relief from his symptoms to soon allow his return to regular gainful employment.

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On April 21, 2004, the relationship of employee-self insured employer-third party administrator existed between the parties.
3. On April 21, 2004, the claimant earned wages sufficient

to entitle him to weekly compensation benefits of \$453.00 for total disability and \$340.00 for permanent partial disability.

4. On April 21, 2004, the claimant sustained a compensable injury to his neck or cervical spine.
5. At the present time, there appears to be no dispute over the claimant's entitlement to reasonable necessary medical services for his compensable injury.
6. There is no dispute over the claimant's entitlement to temporary total disability benefits accruing prior to January 18, 2005.
7. The claimant has proven by the greater weight of the credible evidence that he continued to be temporarily totally disabled, as a result of the effects of his compensable injury from January 18, 2005 though a date yet to be determined. Specifically, he has proven by the greater weight of the credible evidence that he continued within his healing period from the effects of his injury and continued to be rendered totally disabled as a result of the effects of this injury during this period.
8. The respondents have controverted the claimant's entitlement to any temporary total disability benefits accruing after January 17, 2005.
9. A reasonable fee for the claimant's attorney is the maximum statutory attorney's fee on the additional temporary total disability benefits herein awarded.

ORDER

The respondents shall pay to the claimant additional temporary total disability benefits for the period of January 18, 2005 through a date yet to be determined.

The respondents continue to be liable for reasonable necessary medical services required by the claimant for his compensable cervical injury. Such liability is limited 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 additional 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 legal rate of interest until paid.

IT IS SO ORDERED.

MICHAEL L. ELLIG
Administrative Law Judge