

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F704203

ANDY BAILEY	CLAIMANT
WEBB PLUMBING, INC.	RESPONDENT
WESTPORT INSURANCE, INSURANCE CARRIER	RESPONDENT

OPINION FILED NOVEMBER 7, 2007

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

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

Respondents represented by WILLIAM FRYE, Attorney, North Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above styled claim on September 24, 2007, in Springdale, Arkansas.

A pre-hearing order was entered in the case on July 31, 2007. 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. Prior to the commencement of the hearing, the claimant announced that he was only seeking temporary total disability benefits for the period commencing April 23, 2007, and continuing to a date yet to be determined. A copy of this pre-hearing order, with that 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 April 18, 2007, the relationship of employee-employer-carrier existed between the parties.

2. The appropriate weekly compensation benefits are \$504.00 for total disability and \$378.00 for permanent partial disability.
3. On April 18, 2007, the claimant sustained a compensable injury to his neck and back.
4. There is no dispute over the payment of medical services through June 26, 2007.

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 medical services after June 26, 2007.
2. The claimant's entitlement to temporary total disability benefits from April 23, 2007 through a date yet to be determined.
3. Appropriate attorney's fees.

In regard to these issues, the claimant contends:

"Claimant was injured on April 18, 2007. His neck and back were injured when he was in a motor vehicle accident as a passenger."

In regard to these issues, the respondents contend:

"The claimant was involved in a motor vehicle accident on April 18, 2007. In fact, the claimant left the scene of the accident. The insured did not even realize that the claimant was involved in the accident initially. The claimant continued working until the next week. At that point, the claimant went to the emergency room with a complaint of mild pain in the neck. His x-rays of the cervical spine were normal. He was told to return to work on May 2, 2007.

The claimant then went to Dr. Hood, who noted that the claimant did not feel like he could

work at that time. At that point, the claimant had been terminated by his employer due to the fact that he was on his probationary period and continued to use his cell phone at work.

Dr. Hood also ordered a MRI that was read as showing a minimal bulge at C3-4, which is normal for the claimant's age. Also, th MRI of the lumbar spine was complete normal. On June 5, 2007, Dr. Hood noted the claimant said that his lawyer was meeting with the insured but that there was no work available. On June 20,2007, Dr. Hood noted that the claimant's lawyer wanted him to see a specialist. The neurological exam at that point was normal. On June 26, 2007, the diagnosis was anxiety syndrome. The respondents do not have any medical after June 26, 2007. It is the respondents' position that work was available to the claimant up until the date of the termination for cause."

DISCUSSION

I. ADDITIONAL MEDICAL SERVICES

The first issue to be addressed is the claimant's entitlement to additional medical services after June 26, 2007. The burden rests upon the claimant to prove that the medical services he now seeks represent "reasonably necessary medical services", as that term is used in the Act.

Medical services are "reasonably necessary" when they are necessitated by or connected with the compensable injury. Such services must also have a reasonable expectation of accomplishing their intended purpose or goal, at the time such services were rendered. Reasonably necessary medical services are not limited to those medical services intended to resolve or reduce the actual physical damage caused by the compensable injury, but also extend

to medical services necessary to determine the nature and extent of the compensable injury and those merely appropriate to alleviate or reduce the subjective symptoms caused by the compensable injury.

The medical record shows that the claimant was initially evaluated and treated by personnel at the Northwest Medical Center of Washington County. His subsequent treatment was primarily at the hands of Dr. Kin Hood, who appears to be family practitioner. On a limited basis, the claimant has also received some chiropractic treatment.

It appears that the claimant selected Dr. Hood as his treating physician for the compensable injury. However, the respondents appear to have acquiesced to this selection by their subsequent payment of the expense of the services provided by Dr. Hood. I would also note that the respondents' witness, Paula Davidson testified that, when the claimant had reported the employment related injuries, she had sent the claimant to MediServ Clinic. However, she stated that she sent him to this clinic merely for a drug test. She also testified that the claimant never showed at the clinic. I find this latter fact to be of no consequence. The claimant's injuries were sustained in a motor vehicle accident, where he was merely a passenger. Further, the respondents' requested drug test was not attempted until approximately a week following the accident. Finally, I would note that the respondents are in no way contending that the claimant is not entitled to benefits, as a result of his failure to take the drug test.

Although the respondents appear to have authorized the claimant to receive appropriate treatment for his admittedly compensable injuries by Dr. Hood, they appear to have consistently refused to authorize physical therapy that was repeatedly recommended by Dr. Hood. Clearly, a regimented program of physical therapy would be commonly employed and accepted conservative treatment modality for injuries such as those experienced by the claimant. The respondents have given no explanation for their persistent refusal to provide the claimant with this treatment, nor have they presented any evidence, "expert or otherwise", to show that this treatment would be inappropriate.

After consideration of all the evidence presented, I find that a regimented program of physical therapy, as recommended by Dr. Hood, would represent reasonably necessary medical services for the claimant's admittedly compensable injuries. Clearly, this treatment would be necessitated by or connected with the claimant's compensable injuries and would have a reasonable expectation of accomplishing its intended purpose or goal of alleviating or reducing the claimant's symptoms. Pursuant to Ark. Code Ann. §11-9-508, the respondents should be liable for the expense of these services, subject to the medical fee schedule established by this Commission.

The final medical services, in dispute, appear to be the recommendation by Dr. Hood that the claimant be evaluated and possibly treated by a physical medicine specialist, a rehabilitation specialist, or a chronic pain management specialist.

In regard to this recommended "referral", I would note that the records of Dr. Hood show that on the same date as the "referral", the claimant requested that he be sent to a specialist at the direction of his attorney.

The medical evidence shows that the claimant has been evaluated by a medical "specialist", Dr. Richard S. Kyle, on September 18, 2007. Dr. Kyle indicated by his report that he is a neurosurgeon. He stated that he had examined the claimant and reviewed his various tests. Based upon these he opined that only conservative treatment, such as chiropractic care was appropriate.

The medical evidence presented fails to show any neurological complaints. The various tests performed upon the claimant, including x-rays and an MRI study, do not reveal any significant abnormalities, such as fractures, herniated discs, nerve root impingement, spondyloisthesis, etc. It would appear, at the present time, that Dr. Hood would be competent and capable of providing the claimant with appropriate conservative treatment for his compensable injuries and there appears to be no necessity for the services of a "specialist".

Based upon the evidence presented, it is my opinion that an evaluation and possible treatment by a "specialist" does not represent "reasonably necessary" medical services at the present time. I further find that the recommendation by Dr. Hood was made solely at the request of the claimant and was not a bonafide referral by Dr. Hood.

II. TEMPORARY TOTAL DISABILITY BENEFITS

The next issue concerns the claimant's entitlement to temporary total disability benefits for the period beginning April 23, 2007 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, the claimant must prove that, during this time, he continued within his healing period from the effects of his compensable injuries and was also rendered totally disabled from regular gainful employment by the effects of these compensable injuries.

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" until he has achieved the maximum benefit of time and medical treatment in the resolution or stabilization of the actual physical damage caused by the compensable injury. Once this underlying physical damage has resolved or stabilizes, at a 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, once this has occurred, will not extend the healing period.

In the present case, the medical evidence shows that the claimant was under active medical treatment, primarily by Dr. Hood, from April 25, 2007 through at least June 22, 2007. The only medical record, after that date, is the note from Dr. Kyle, dated September 18, 2007. Although Dr. Kyle opines that the claimant

requires no neurosurgical treatment, he does state that continued chiropractic treatment would be appropriate for the claimant's compensable injuries. Although Dr. Kyle states that he finds no permanent impairment, neither does he indicate that the claimant has achieved maximum healing. Curiously, there are no reports or records of any chiropractic treatment received by the claimant immediately before or after this report. In fact, the claimant's testimony reveals only a visit or two immediately following the accident and injury.

After consideration of all the evidence presented, I find that the medical evidence proves that the claimant's healing period from the effects of his compensable injuries has not ended by the date of hearing. During this time, the evidence shows that the claimant had not achieved the maximum benefit of time and medical treatment in the resolution or stabilization of the actual physical damage caused by his compensable injuries. Therefore, he has satisfied the first requirement for his entitlement to the temporary total disability benefits he now seeks.

In regard to actual disability, the claimant testified that during this time, his complaints had improved. He further stated that, although he had made an attempt to look for work, he subsequently abandoned this effort because he did not feel that he could do the work required of a plumber. He acknowledged that for a portion of the time during which he is now seeking temporary total disability benefits, he had been incarcerated for traffic

violations. Finally, he stated that he is physically capable of doing a little yard work, some gardening, and leaf raking.

The medical records show that the claimant was initially taken entirely off work by the physicians at the emergency room of the Northwest Medical Center of Washington County on April 25, 2007. The claimant was again restricted from any type of work by Dr. Hood on April 27, 2007. The records of Dr. Hood further show that the claimant's restrictions from working were repeatedly extended through the date of the follow up evaluation on June 20, 2007. At that time, Dr. Hood stated that the claimant would be physically unable to work for at least two more weeks. Dr. Kyle placed no particular restrictions against the claimant working after his evaluation on September 18, 2007.

In determining the existence of actual disability, consideration is not limited solely to the claimant's ability to return to his preinjury position. Rather, consideration must be given to the claimant's physical ability to perform any type of regular gainful employment for which he would otherwise be qualified.

The evidence shows that in this case the claimant is relatively young, being 39 years of age. At the hearing, the claimant exhibited at least average intelligence. He appeared personable and seemed to possess educational skills at least the equivalent of a high school graduate.

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 was rendered totally disabled from performing any form of regular gainful employment, by the effects of his compensable injuries, from April 23, 2007 through July 3, 2007. In reaching this decision, I have placed more weight on the medical restrictions imposed by Dr. Hood, than on the claimant's description of his limitations.

However, I further find that the claimant has failed to prove that he continued to be rendered totally disabled as a result of the effects of his compensable injuries, after July 3, 2007. Although the disabling effects of the compensable injuries may still have prevented the claimant after July 3, 2007, from returning to his preinjury employment as a plumber, the evidence presented (including the claimant's own testimony concerning his continuing limitations, during and after August of 2007) would support the conclusion that the claimant could have performed various employment positions in the area of sales, clerical work, light delivery and light assembly line or manufacturing fields. These positions exist in sufficient number in the area of the claimant's residence to afford him a reasonable expectation of obtaining regular employment. The claimant's continued unemployed status appears to be attributable more to the claimant's lack of motivation in seeking employment in other areas and at less wages. The fact that the positions remaining available to the claimant would be at significantly less wages than those he was earning at the time of his injury and in his apparent chosen profession of a

plumber does not excuse him from making a good faith attempt to seek or obtain these lesser paying types of employment.

Therefore, in regard to the second necessary element for the claimant's entitlement to temporary total disability (i.e. actual total disability), I find that the claimant has proven such actual total disability for the period of April 23, 2007 through July 3, 2007. However, he has failed to prove actual total disability, after July 3, 2007.

In summary, I find that the claimant is entitled to temporary total disability benefits for the period of April 23, 2007 through July 3, 2007. He has proven that during this time he continued within his healing period from the effects of his compensable injuries and was rendered actually totally disabled by these injuries. The fact that the claimant may have been incarcerated for a portion of this period in the Washington County jail would not relieve the respondents from liability for benefits during this entire period, Hoover Construction Company v. Armstrong, 73 Ark. App. 146, 41 S.W. 3rd 822 (2001).

FINDINGS OF FACT & CONCLUSIONS OF LAW

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

2. On April 18, 2007, the relationship of employee-employer carrier existed between the parties.

3. On April 18, 2007, the claimant earned wages sufficient to entitle him to weekly compensation benefits of \$504.00 for total disability and \$378.00 for permanent partial disability.

4. On April 18, 2007, the claimant sustained compensable injuries to his neck and back.

5. There is no dispute over the payment of medical services provided through June 26, 2007.

6. The claimant has proven by the great weight of the credible evidence that the medical services recommended him by Dr. Kin Hood, in the form of a formal program of physical therapy, constitutes reasonably necessary medical services for the claimant's compensable injuries. The evidence presented further proves that continued follow up by Dr. Hood would also represent reasonably necessary medical services for the claimant's compensable injuries. The evidence presented fails to prove that an evaluation and/or treatment by a medical "specialist" would be, at this time, medically appropriate or necessary for the claimant's compensable injuries. Pursuant to Ark. Code Ann. §11-9-508, the respondents would be liable for any expense incurred for the recommended program of physical therapy and follow up by Dr. Hood. This liability is subject to the Commission's medical fee schedule. The respondents would not be liable, at the present time, for the expense of an evaluation by a medical "expert".

7. The claimant has proven that he has been rendered temporarily totally disabled as a result of the effects of his admittedly compensable injuries, for the period beginning April 23, 2007, and continuing through July 3, 2007. Specifically, the claimant has proven that during this time he continued within his healing period from the effects of his compensable injuries and was

also rendered totally disabled from performing all forms of regular gainful employment as result of the effects of these compensable injuries. However, the claimant has failed to prove that after July 3, 2007, he has continued to be rendered totally disabled from performing all forms of regular gainful employment, for which he would otherwise be qualified as the result of the effects of the admittedly compensable injuries.

8. The respondents have controverted the claimant's entitlement to any temporary disability benefits and his entitlement to any medical services after June 26, 2007.

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

ORDER

The respondents shall pay to the claimant temporary total disability benefits for the period of April 23, 2007 through July 3, 2007. The respondents shall be liable for the expense of the medical services recommended by Dr. Hood, in the form of a program of physical therapy, and for continued follow up by Dr. Hood.

The respondents shall pay to the claimant temporary total disability benefits for the period beginning April 23, 2007 and continuing through July 3, 2007.

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 the obligation of the respondents in addition to such benefits.

The remaining one-half of this fee is to be withheld by the respondents from these 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