

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F610122

KENNETH BOWDEN	CLAIMANT
LANDSCAPE SERVICES OF ARK.	RESPONDENT
CINCINNATI CASUALTY CO. INSURANCE CARRIER	RESPONDENT

OPINION FILED NOVEMBER 14, 2007

Hearing before ADMINISTRATIVE LAW JUDGE ELIZABETH DANIELSON in Fort Smith, Sebastian County, Arkansas.

Claimant represented by EDDIE H. WALKER, JR., Attorney, Fort Smith, Arkansas.

Respondent represented by WILLIAM FRYE, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held on October 11, 2007, in Fort Smith, Arkansas.

A pre-hearing conference was held in this claim, and as a result a pre-hearing order was entered in the claim on August 9, 2007. This pre-hearing order set forth the stipulations offered by the parties, the issues to litigate and the contentions thereto.

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 June 7, 2006, the relationship of employee-employer-carrier existed between the parties.

3. The claimant sustained a compensable injury to his back on June 7, 2006.

4. The claimant is entitled to a compensation rate of \$253 for temporary total disability based on an average weekly wage of \$380.38.

By agreement of the parties the issues to litigate are limited to the following:

1. Temporary partial disability from March 1, 2007, to a date to be determined.

2. Attorney's fees.

In regard to the foregoing issues the claimant contends that he is entitled to temporary partial disability benefits from March 1, 2007, until a date yet to be determined. The claimant contends his authorized physician has recommended additional diagnostic testing and that such testing is reasonable and necessary and should, therefore, be determined to the liability of the respondents. The claimant contends that his attorney is entitled to an appropriate attorney's fee.

In regard to the foregoing issues the respondents contend that the claimant suffered an aggravation of problems to his back on June 7, 2006, while attempting to start a weed eater. He was initially seen by Dr. Harmon who treated him conservatively with pain medication and home exercises. The claimant continued to complain of pain and he was referred to Dr. Capocelli for further treatment. The claimant underwent an MRI scan that showed degenerative disc disease at L5-S1 with loss of disc space height and disc protrusions at L4-5 and L5-S1. Dr. Capocelli placed the claimant on light duty and ordered physical therapy. On November

1, 2006, the claimant underwent a functional capacity evaluation. It was noted that the claimant gave unreliable effort with 35 of 55 consistency measures. He was placed in the light category. In his report of November 22, 2006, Dr. Capocelli noted the claimant's functional capacity evaluation indicated malingering or embellishment within the evaluation. He released the claimant to regular duty by Dr. Capocelli without impairment. In particular, the therapist noted the claimant gave submaximal effort and had a positive waddell's. Also, that the claimant's pain reports did not correlate with his function. The claimant was able to enter and exit the office at a normal pace. The claimant then requested a change of physician to Dr. Covington who wants to do a diskogram and a fusion. Subsequent to this, the respondents scheduled an independent medical evaluation with Dr. Bruffett which was cancelled by Mr. Walker. Because of the fact that we have two completely opposite medical opinions, the respondents request that the claimant either make himself available for an evaluation with Dr. Bruffett, or that the Commission choose a doctor for the evaluation at the respondents' expense.

The documentary evidence submitted in this matter consists of the Commission's pre-hearing order marked Commission's Exhibit No. 1. The respondents submitted medical records marked Respondents' Exhibit No. 1. All these exhibits were admitted without objection.

DISCUSSION

The parties have stipulated and the claimant has testified that he sustained a compensable injury while working for the

respondent on June 7, 2006, while pulling on a weed eater. The claimant agreed that his treating physician took him off work for a period of time and that benefits were paid to him by the respondent. The claimant also agreed that he underwent a functional capacity evaluation and following this Dr. Capocelli released him from his care. The claimant affirmed that he saw Dr. Capocelli on October 25, 2006, underwent a functional capacity evaluation on November 1, 2006, and then Dr. Capocelli released him on November 22, 2006. The claimant testified that between the October visit and the November visit to Dr. Capocelli his back condition did not improve. The claimant agreed that he was taking prescription medications at the time of his functional capacity evaluation. The claimant agreed that he saw Dr. Covington in March 2007 and that this doctor physically examined him and placed a twenty-pound lifting restriction on him. The claimant indicated that he could not perform his work for the respondent with a twenty-pound weight restriction and began drawing unemployment benefits since the time he was seen by Dr. Covington. The claimant testified that his unemployment benefits were \$145 per week before taxes. The claimant testified that he has looked for work within his restrictions since he was seen by Dr. Covington but has been unable to find work. The claimant testified that he has been unable to get the treatment as recommended by Dr. Covington because he has been financially unable to obtain the tests recommended. The claimant testified that no physician has released him to return to regular work since he was seen by Dr. Covington on March 1,

2007, and it was his opinion that he was unable to go back to work at regular duty due to the pain in his back and low back.

The claimant testified that the work which he did for the respondent involved landscaping, yard care, and weed eating, all of which were very physically demanding jobs. The claimant testified that prior to working for the respondent he did paint and body work which also was very physical in that it required lots of bending and stooping. The claimant was asked if there was any job which he had done in his past that he could go back on a full time regular basis within a twenty-pound weight restriction. The claimant responded, "No."

On cross examination, the claimant testified that from the time Dr. Capocelli released him to regular duty his condition has not changed. The claimant testified that he takes muscle relaxers and pain medications prescribed by Dr. Kale and Dr. Covington. The claimant testified that his discomfort is mainly in his lower right low back but he has pain on both sides and pain that shoots down his right leg. The claimant testified that he does not recall telling Dr. Standefer that there were days when he was without pain but the claimant did testify that if he is just laying around he does not notice his discomfort as much. The claimant testified that he had a fall when stepping out of his garage which escalated his back pain after he had been seen by Dr. Covington but before he had seen Dr. Standefer. When asked the claimant testified that he has had muscle problems in the past but noting like he currently is experiencing. The claimant testified that in the past he was

involved in a motor vehicle accident which resulted in him having bulging discs in his neck. The claimant testified that he does not recall an event in April 2004 where he was seen at the ER for an onset of severe left sided low back pain due to pulling on a weed eater. The claimant was questioned about a couple other reported injuries which caused him to be seen by a medical provider which involved his low back or neck. The claimant testified that he has had muscle pain and back pain in the past but has never had anything similar to what he is currently experiencing. The claimant testified that the physical therapy and exercises which Dr. Capocelli recommended did not do him any good. It was pointed out to the claimant that on the various physical therapy notes it is reported that the claimant appeared to tolerate all exercises well and did not have difficulty getting on and off the equipment. The claimant responded by saying that occasionally he did have problems. The claimant explained that when the report indicates that he reported to the therapist that he had been pruning limbs off trees at his home on the weekend he was using a pair of hand pruners like a pair of plyers. The claimant was told that his functional capacity evaluation indicated that he was self limiting in his efforts during the test. The claimant responded that he did not understand the whole deal of what he was suppose to be doing exactly. The claimant agreed that after Dr. Capocelli reviewed his FCE report the doctor released him to full duty. The claimant testified that when Dr. Capocelli released him it was his understanding that the doctor said that there was nothing else he

could do for him. The claimant agreed that in his deposition he had stated that Dr. Capocelli had told him that there was nothing wrong with him. The claimant agreed that he could still drive a truck, and the zero turn radius mower, supervise, do weed eating, and bag leaves. The claimant agreed that the reason he was laid off in March was because there was no work. The claimant testified that the places where he has looked for employment have been lawn services and paint and body shops. The claimant agreed that he could stoop and bend but not for a long period of time. The claimant was asked if he was aware that Dr. Covington had noted that he had some exaggeration of his symptoms and the claimant responded, "No, not to no extent." The claimant agreed that at the time of his accident he was already taking Tylenol and ibuprofen for his bulging disc in his neck.

On redirect examination, the claimant remembered that after his FCE he was not examined by Dr. Capocelli. The claimant testified that he would not be able to safely operate a truck for eight hours a day, operate a mower all day, or paint for eight hours a day. The claimant indicated that even though he would be able to do some of these activities he would not be able to do them for an eight-hour working day. The claimant testified that his back condition is not exactly the same every day in that his discomfort level goes up and down.

On recross examination, the claimant testified that it was his understanding that Dr. Capocelli was releasing him. The claimant testified that he has not followed up on the recommendation by Dr.

Standefer to get his GED. The claimant testified that he did not think he could pass the test because he was not that smart. The claimant testified that he can read and write but he does not have a good memory.

On redirect examination, the claimant agreed that he has worked around paint fumes for over twenty years and it is his opinion that this has affected his memory.

The medical records set forth that the claimant was first seen at Cooper Clinic following his compensable injury by Dr. Pamela Harmon. Upon examination, Dr. Harmon notes that the claimant has some tenderness and muscle spasm on the right lower lumbar area in the para spinus region. The claimant was diagnosed with lumbar strain and conservative treatment with medications were recommended. Dr. Harmon also took the claimant off work for four to five days but notes that if the claimant gets better in forty-eight hours he can return and she will release him to return to work. On June 11, 2006, Dr. Samms writes that the claimant reports that his prescribed medicines were not giving him much help. After examination, the claimant again was diagnosed with lumbar strain and Dr. Samms limited the claimant's activities to no pushing or pulling more than fifty pounds and no lifting more than twenty-five pounds or doing repetitive motions of the back other than his exercises. Dr. Samms did not prescribe any further pain medications for the claimant. Dr. Charles Chalfant writes on June 18, 2006, that the claimant is reporting that he is worse with pain in his low back now radiating all the way down to his foot at

times. After examination, Dr. Chalfant diagnosed the claimant with having lumbar radiculitis and ordered an MRI as well as prescribed medications. The claimant underwent an MRI of his low back on June 20, 2006, which revealed a broad posterior disc bulge or protrusion at L5-S1 including a right para central component of disc protrusion. This test also set forth that there was some narrowing of the foramina bilaterally at this level especially on the right. The MRI also revealed that at L4-5 level there is mild bulging of the disc of some asymmetry into the right foramen versus a superimposed small right foraminal disc protrusion. The claimant was seen by Dr. Anthony Capocelli on August 4, 2006. After taking the claimant's history of his compensable injury Dr. Capocelli notes that the claimant was involved in a motor vehicle accident some years earlier which resulted in him having continued neck problems. After an examination and relying on what the claimant reported the results of his MRI to be, Dr. Capocelli diagnosed the claimant with L4-5 and L5-S1 disc protrusion with some lateralization to the right side as well as degenerative disc disease. Dr. Capocelli writes that he feels that the claimant has had an injury that is related to his work noting that the claimant had a history of some back spasm but at this point the doctor did not feel the claimant's symptoms were related to the disc protrusions. Dr. Capocelli did not recommend surgery but rather a more aggressive non invasive treatment program to include lumbar epidural steroid injections, physical therapy, and medications. Dr. Capocelli recommended that the claimant could do sedentary

light duty work in the landscaping business but did not want him on any narcotics due to his working around machinery. X-rays read by Dr. Capocelli on August 4, 2006, reveal no evidence of fracture or subluxation with some questionable degenerative disc disease at L5-S1 level with loss of disc space height and some inplate modic-type changes and possibly some mild posterior degenerative changes noted at that level but the remainder of the claimant's lumbar spine appeared normal. Dr. Capocelli writes on September 20, 2006, that the claimant has experienced a new injury while riding the lawn mower, however he would like to proceed with a work hardening program through his physical therapy to be followed by a functional capacity evaluation. Dr. Capocelli writes that the claimant reports deep pain and some snapping mobility with occasional pain that goes down the leg and can be exacerbated by Valsalva but reports that his pain seems to be primarily mid line axis pain in the lower back. Dr. Capocelli recommended that they continue the claimant's medications, physical therapy and a functional capacity evaluation. On October 25, 2006, Dr. Capocelli writes that the claimant has gotten very little relief from his non operative treatment program. The doctor recommended that the claimant start back on his injections and to go ahead with a functional capacity evaluation. Dr. Capocelli indicates that if the injections do not help and the functional capacity evaluation indicates that he is not going to be able to return to any kind of work then they would definitely look into surgical intervention. Dr. Capocelli writes an addendum to his October 25, 2006, office report that the

claimant's pain seems worse than he would have expected given the anatomical findings. Dr. Capocelli writes that at this point the claimant's injections have not helped but they will continue with this course of treatment and attempt to get a functional capacity evaluation to evaluate his work status. Dr. Capocelli notes that if the claimant complies better with his series of appointments and his functional capacity evaluation continues to appear reasonable then they will just continue with a conservative course of treatment. The claimant underwent a functional capacity evaluation on November 1, 2006. The evaluator notes that the claimant's evaluation indicated that he gave an unreliable effort with 35 of 55 consistency measures. The evaluator then went through several different testing modalities that the claimant demonstrated unreliable effort. The evaluator concludes that the claimant had unreliable status of effort noting that the claimant put forth inconsistent effort and demonstrated inconsistencies with inappropriate illness responses. The evaluator notes that the claimant demonstrated the ability to perform work at least at the light physical demand classification. On November 22, 2006, Dr. Capocelli writes that the claimant had a recent FCE and unfortunately this test had multiple inconsistencies consistent with a possibility of lingering or embellishment within the evaluation. Dr. Capocelli notes that it is very difficult to make any final impairment or work restrictions with this patient due to the unreliability of the testing. Dr. Capocelli recommended that the claimant returned to his regular work as they cannot really

establish any form of injury at this point. Dr. Capocelli gave the claimant a zero impairment based on the lack of non objective evaluation. Dr. Capocelli notes that the claimant does have on his MRI several broad based bulges or protrusions at L4-5, L5-S1 that could be degenerative or possibly traumatic but giving inconsistencies in the etiology he would assume that these were just degenerative and would not issue the claimant an impairment rating.

Dr. Christopher Covington writes on March 1, 2007, a history of the claimant's illness as reported by the claimant. After physical examination and review of his tests, Dr. Covington assessed the claimant with having degenerative disc disease at L4-5 and L5-S1 and to rule out L3-4, L5-S1 herniated nucleus pulposus. Dr. Covington recommended a diskogram and based on these results a treatment plan will be devised. Dr. Covington writes on March 1, 2007, that the claimant's MRI scan has slight dissection with probable disc protrusion at L4-5 and frank degeneration at L5-S1 with central disc herniation. Dr. Covington notes that the claimant had a pre-existing degenerative disc at 5-1 but does have a disc protrusion in the mid line. Dr. Covington notes that the claimant reports pain in his middle low back that is affecting both lower extremities and the doctor opines that this is due to his on the job injury to a pre-existing degenerative disc at 5-1. Dr. Covington writes that the claimant needs a diskogram at L3-4 and L4-5. Dr. Covington opines that the claimant will be a candidate for lumbar interbody fusion and fixation for chronic mechanical low

back pain. Dr. Michael Standefer writes on September 17, 2007, that he has seen the claimant and took a history of the claimant's back problems. Dr. Standefer also notes that the claimant has a past medical history of pain affecting his neck although this is more of a chronic problem and not as a result of his current complaint. Dr. Standefer notes that the claimant complains of persistent right para lumbar pain that radiates into the right hip and into the right lower extremity, noting that sitting, standing, and walking will all aggravate his pain although it is unpredictable. Dr. Standefer writes that the claimant reports that he may go a day or two without any pain then have a relapse and reports that he feels like there is something sharp sticking in his back. Dr. Standefer notes that the claimant fell several months ago and had an escalation of back pain although an MRI done at that time did not reveal any changes from his previous studies. After examination and review of the claimant's 2006 MRI, Dr. Standefer writes that the claimant has degenerative disc at the L5 level and attendant disc bulging/protrusion with slight lateralization to the right. Dr. Standefer writes that this is a severely degenerative L5 disc, noting that there is mild degenerative change noted at L4-5. Dr. Standefer notes that a diskogram would certainly seem to be reasonable. Dr. Standefer recommended that the claimant obtain his GED due to his limited education. Dr. Standefer reviewed the claimant's x-rays taken that day and noted that he had no scoliosis and no obvious spondylolisthesis or spondylolysis. Dr. Standefer does note that the claimant has moderately severe degenerative

change noted at L5 but there is no obvious slippage on either flexion or extension views. Dr. Standefer writes that there is no destructive lesion identifiable and there is no evidence of discitis or osteomyelitis.

I find after a review of all the testimony and evidence presented in this matter that the claimant has proven by a preponderance of the evidence that he is entitled to temporary partial disability from March 1, 2007, to a date to be determined. It is noted, however, when the claimant was last seen by Dr. Capocelli he was released to full duty with no limitations set forth and no impairment rating. This release followed the claimant's functional capacity evaluation where it was indicated several times that the claimant gave less than maximum effort on many of the tests performed. Dr. Covington, however, has indicated that the claimant should have additional testing in the form of a diskogram and Dr. Standefer has agreed with this opinion. The respondents, at the time of the hearing, did agree to accept the recommendations of Dr. Covington and Dr. Standefer and have the claimant undergo additional testing. It would seem clear, therefore, that the claimant has not reached the end of his healing period and is to undergo additional testing on his low back and possible additional medical treatment. When the claimant was seen by Dr. Covington he did place a twenty pound lifting restriction as well as other active restrictions on the claimant. The claimant has testified that since March 1, 2007, he has been drawing unemployment insurance in the amount of \$145 per week. It has been

stipulated that the claimant is entitled to a temporary total disability rate of \$253 per week, therefore in accordance with Ark. Code Ann. §11-9-506(b) I find that the claimant is entitled to the difference between his temporary total disability rating and what he is receiving in unemployment benefits which is \$108 per week. The respondents, therefore, should pay to this claimant \$108 per week for temporary partial disability to a date to be determined. It is noted that the Commission was contacted by Joe Flake of the Crawford County Child Support Enforcement Unit informing the Commission that the claimant was in arrears of child support at the time of the hearing in the amount of \$3,313.80. The respondents, therefore, should verify this amount and if correct deduct not more than half of the claimant weekly benefits to address his child support arrearage.

FINDINGS & CONCLUSIONS

1. The Arkansas workers' Compensation Commission has jurisdiction of this claim.
2. On June 7, 2006, the relationship of employee-employer-carrier existed between the parties.
3. The claimant sustained a compensable injury to his back on June 7, 2006.
4. The claimant is entitled to a compensation rate of \$253 for temporary total disability based on an average weekly wage of \$380.38.
5. The claimant has proven by a preponderance of the evidence that he is entitled to temporary partial disability from March 1,

2007, to a date to be determined in the amount of \$108 per week. See discussion above.

6. The Commission has been informed that the claimant is in arrear of child support from the Crawford County Child Support Enforcement Unit in the amount of \$3,313.80. See discussion above.

7. The respondents have controverted this claimant's entitlement to temporary partial disability.

8. The claimant's attorney is entitled to the maximum statutory attorney's fee based on the benefits awarded herein.

ORDER

The claimant has proven by a preponderance of the evidence that he is entitled to temporary partial disability from March 1, 2007, to a date to be determined in the amount of \$108 per week.

The maximum statutory amount can be deducted from this claimant's weekly benefit to satisfy any child support arrearage he might have.

The respondents shall pay to the claimant's attorney the maximum statutory attorney's fee on the additional benefits awarded herein, with one half of said attorney's fee to be paid by the respondents in addition to such benefits and one half of said attorney's fee 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.

ELIZABETH DANIELSON
ADMINISTRATIVE LAW JUDGE