

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F613163

DANNY FRY	CLAIMANT
JARDEN CORP	RESPONDENT
SENTRY INSURANCE COMPANY, INSURANCE CARRIER	RESPONDENT

OPINION FILED AUGUST 29, 2007

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

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

Respondents represented by JOSEPH PURVIS, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above styled claim on June 26, 2007, in Fort Smith, Arkansas.

The deposition of the claimant was taken on April 17, 2007, and has been admitted as Respondents' Exhibit No. 2 to the current proceeding. The deposition of Dr. Joseph Queeney was taken on May 21, 2007, and has been admitted as Claimant's Exhibit No. 2 to the current proceeding.

A pre-hearing order was entered in this case on March 9, 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. At the time of the hearing, the parties announced that they had agreed on the appropriate weekly compensation rates and that the period of temporary total disability in dispute ended on February 18, 2007. A copy of the pre-hearing order with these amendments 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 all relevant dates, the relationship of employee-employer-carrier existed between the parties.
2. The appropriate weekly compensation rates are \$488.00 for total disability and \$366.00 for permanent partial disability.
3. The claim is 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, either as the result of specific trauma or cumulative trauma over time.
2. The claimant's entitlement to the payment of medical expenses, temporary total disability from November 18, 2006 through February 18, 2007, and attorney's fees.

In regard to these issues, the claimant contends "that on November 15, 2006, he sustained a compensable injury to his back when he was bending over performing his job duties on November 15, 2006. In the alternative, the claimant contends that his general job duties caused his herniated disc and that the respondents have previously accepted liability for a back injury and various flare ups and that therefore, this claim should be treated as a claim for additional benefits in regard to any episodes regarding the claimant's back for which the respondents have provided medical treatment. The claimant contends that he is entitled to temporary

total disability benefits from on or about November 18, 2006 until a date yet to be determined and reasonably necessary medical treatment. The claimant contends that his attorney is entitled to an appropriate attorney's fee."

In regard to these issues, the respondents contends "that the claimant had a 10 year history of low back problems which forced him to miss work some two to three times per year for the 10 year period. That the claimant worked at least two outside jobs apart from the respondent, which jobs he worked approximately up until the time of the incident, those being constructing metal buildings and operating a lawn service taking care of at least 5 yards per week. That the claimant admitted that he had dull and radiating pain in the left leg sometime prior to November 2006. That the claimant cannot point to a specific incident at work on or about November 14, 15, or 16, 2006, that is responsible for his problem. That the claimant's herniation of a disc at L5-S1 is the result of something outside of his job with the respondent and therefore is not a compensable incident."

DISCUSSION

I. COMPENSABILITY

The first issue to be addressed in the present claim, is the question of whether the claimant sustained a "compensable injury" to his back during his employment with the respondent. The claimant alleges that this compensable injury was either in the form of a specific incident or is in the form of cumulative stress

and trauma over time. The burden rests upon the claimant to prove all of the facts necessary to establish a “compensable” injury.

For either specific incident or cumulative trauma injuries, the first of the required elements of compensability are found in Ark. Code Ann. §11-9-102(4)(D). Under this subsection, the claimant must prove by medical evidence, the actual existence of the physical injury or condition which is alleged to be compensable. Further, the claimant must prove that the actual existence of this physical injury or condition is supported by “objective findings”, as that term is defined by Ark. Code Ann. §11-9-102(16)(A)(i).

The medical record clearly establishes the actual existence of a physical injury to the claimant’s back or lumbar spine. This injury is in the form of a large left sided disc herniation with an extruded free fragment of disc material that significantly compresses both the thecal sac (the lining or cover over the spinal cord) and the left S1 nerve root. The medical record further shows the presence of purely objective findings to support the existence of this diagnosed injury or condition. These findings are in the form of muscle spasms in the lumbar area, defects noted by plain x-rays and a lumbar MRI study that was performed on November 20, 2006 and visible observation was made during corrective surgery. Thus, the claimant has satisfied the requirements for a “compensable injury” that are contained in Ark. Code Ann. §11-9-102(4)(D).

Next, the claimant must prove that this medically established and objectively documented physical injury satisfies the

definitional elements required for a “compensable injury” contained in either Ark. Code Ann. §11-9-102(4)(A)(i) or §11-9-102(4)(A)(ii)(b). The definitional elements for a compensable injury” under §11-9-102(4)(A)(i) are:

- (1) The injury must arise out of and occur in the course of the employment.
- (2) The injury must be caused by a specific incident.
- (3) The injury must be identifiable by time and place of occurrence.
- (4) The injury must cause internal or external physical harm to the claimant’s body.
- (5) The injury must require medical services or result in disability.

The definitional elements for a compensable injury under §11-9-102(4)(A)(ii)(b) are:

- (1) The injury must arise out of and occur in the course of the employment.
- (2) The injury must cause internal or external physical harm to the claimant’s body.
- (3) The injury must be to the claimant’s back or neck.

For injuries falling under the provisions of §11-9-102(4)(A)(ii)(b), the claimant must also prove by the greater weight of the credible evidence that the employment related injury was the “major cause” (more than 50 percent of the cause) of the claimant’s need for medical treatment or of any disability he has experienced, Ark. Code Ann. §11-9-102(4)(E)(ii).

It is obvious that two of the definitional elements of §11-9-102(4)(A)(i) and §11-9-102(4)(A)(ii)(b) are identical. The first of these elements is that the injury must arise out of and occur in

the course of the employment. The second element is that the injury must cause external or internal harm to the claimant's body.

This first essential element has historically been a requirement for any type of compensable injury. In order to prove that an injury has arose out of and was in the course of the employment, a claimant must show that the injury occurred while employment services were actually being performed and that this injury was causally related to the employment.

However, the claimant need not show the existence of this causal relationship to an absolute or mathematical certainty. It is only necessary that the existence of this causal relationship is shown to be likely or probable. Further, it is not necessary that the employment be the sole or even the "major cause" of the actual injury itself. It is only necessary that the employment be a substantial cause of the actual injury.

In the present case, the only primary evidence presented by the claimant to prove the existence of a causal relationship between his employment activities for the respondent and the medically established and objectively documented large left sided herniation of the L5-S1 intervertebral disc with an extruded free fragment and significant compression of the thecal sac and exiting S1 nerve root, is the claimant's own testimony. Although the testimony of a party is never considered uncontradicted, it cannot be arbitrarily disregarded. If such testimony is credible, it may be sufficient, in and of itself, to prove any fact it is legally competent to address. Clearly, the claimant's testimony would be

legally competent to prove the existence of a reasonably close temporal relationship between his employment activities and the initial onset of symptoms indicative of the occurrence of the disc herniation. His testimony would also be competent to show no other associated trauma.

In the present case, the claimant testified that, on November 14, 2006, he was performing his regular assigned employment activities. These activities involved bending, picking up, and lifting plug racks, and (on the day in question), being in a bent over posture of approximately 90 degrees for an extended period of time. In his deposition, he indicated that the photographs attached thereto did not accurately demonstrate the activities he was performing on November 14 and 15, 2006. He stated that for some reason, which he cannot recall, the racks that day were not placed upon the stands shown in the photographs, but were placed on sawhorses, which were lower to the floor. He stated that while performing these employment activities, on November 14, 2006, he began experiencing pain in his lower back. This pain had become severe and was radiating down his left leg by approximately 11:00 p.m. or his shift break. However, he continued to perform his assigned employment activities and finished his shift, which ended on the morning of November 15, 2006. He continued to experience significant difficulties with his lower back and into his left lower extremity and awakened in even more severe pain. Before he went to work for his shift, which began at 6:30 p.m. on November 15, 2006, he took pain medication, in the form of hydrocodone. He

again finished his shift, which ended at 3:30 a.m. on November 16, 2006. Later that morning, he reported his difficulties to the respondent's plant nurse and was sent to the company doctor, Dr. Keith Holder. He was seen by Dr. Holder on November 16, 2006. In his testimony, the claimant conceded that he had previously experienced episodes of difficulties with his lower back and some degree of difficulties with his left lower extremity. However, he indicated that these difficulties had readily resolved with medical treatment and did not result in any significant loss of work. The claimant denied any increase in his difficulties, as the result of any non employment related stress or trauma to his back after the onset of his current episode of difficulties.

The claimant is a 21 year employee of the respondent and has worked for the respondent for essentially all of his working life (the claimant is only 39 years old). His actions on and after November 14, 2006, are consistent with this testimony. The claimant reported his injury and sought medical treatment within a reasonable period of time after November 14, 2006. The histories of the onset of his difficulties that were related to his various treating physicians coincide with the history given in his testimony, both at the hearing and at his deposition.

The claimant's testimony concerning the initial appearance of his current episode of lumbar and radicular difficulties and the difference between his most recent episode of lumbar and radicular difficulties compared to his previous episodes of lower back difficulties, is substantiated by the testimony of two of his co-

employees, Nelson Edward Rozell and Robert Alan Beren, Jr. Both of these witnesses testified that they had never seen the claimant experiencing the level of difficulties he exhibited in November of 2006. I find these witnesses to be highly credible.

After consideration of all the evidence presented it is my opinion that the claimant's description of the activities being performed at the time of the initial episode of his current episode of lumbar and radicular difficulties is credible and accurately reflects the events surrounding the onset of these difficulties. Thus, I find that the claimant has proven the existence of a close temporal relationship between his employment activities for this respondent on November 14, 2006, and the first appearance of symptoms indicative of the occurrence of a complete herniation of the left side of the L5-S1 intervertebral disc with the extrusion of free disc fragments.

Clearly, the stress placed upon the claimant's lumbar spine by his employment related activities, on November 14, 2006, could reasonably and logically have produced the subsequently diagnosed complete herniation or tear of the annulus of the L5-S1 intervertebral disc and the extrusion of free fragments of inter disc material so as to compress the claimant's spinal cord and exiting nerve roots. In this regard, I would note that there is no indication in any of the reports or records of the various physicians who have examined the claimant, subsequent to November 14, 2006, that they in any way felt that the diagnosed complete rupture of the L5-S1 intervertebral disc and extrusion of free

fragments of inter disc material was in any way inconsistent with the claimant's history of the onset of his symptoms.

The deposition of Dr. Queeney reflects that it is his expert medical opinion that the claimant's symptoms in his lower back and more particularly, the radicular symptoms into his left leg would have occurred almost simultaneously with the actual complete rupture and extrusion of the free disc fragments. He also opined that it would have been highly unlikely that the claimant could have continued to work for any significant period of time after this occurred. There is absolutely no evidence presented of the occurrence of any other incident or trauma of stress on the claimant's lumbar spine, on or about November 14, 2006, that would reasonably be expected to produce the actual physical damage subsequently observed and the onset of the claimant's symptoms.

In reaching this decision, I am aware that the claimant had experienced previous difficulties involving his lower back and even his left lower extremity. These prior episodes of difficulties also appear to be work related. However, the claimant was examined by competent medical personnel, following these episodes of difficulties and there was no indication of any actual nerve root impingement or radicular complaints. Straight leg raising tests were indicated as negative, as well as neurological testing. As the claimant testified, medical evidence shows only brief periods of treatment with complete resolution of symptoms. It must also be noted that following each of these episodes of difficulties, the claimant returned to work and performed relatively stressful

employment activities without complaint. This would clearly be inconsistent with the presence of a frank rupture and extruded free fragment impinged on the left S1 nerve root, as indicated by the deposition of Dr. Queeney.

After consideration of all the evidence presented, it is my opinion that the claimant has proven the existence of the necessary causal relationship between his employment activities for this respondent, on November 14, 2006, and his medically established and his objectively documented physical injury to his lumbar spine, in the form of a large left sided complete tear or rupture of the L5-S1 intervertebral disc with a resulting extrusion of a free fragment of interior disc material and impingement on the left exiting S1 nerve root. In reaching this decision, I have followed the longstanding rule announced in Hall v. Pittman Construction Company, 235 Ark. 104, 357 S.W. 2nd 263 (1962). It is my further opinion that the existence of this proven causal relationship satisfies the fundamental requirement of compensability that the injury must arise out of and occur in the course of the employment.

As previously noted, the medical evidence unquestionably shows that the claimant experienced a large left sided complete tear or herniation of the L5-S1 intervertebral disc and actual extrusion of free fragments of interior disc material outside of the disc, which resulted in compression or impingement on the protective lining or coating of the spinal cord and, more importantly, on the exiting S1 nerve root. This nerve root impingement resulted in neurological deficits or symptoms involving the claimant's left lower extremity.

Such evidence is unquestionably sufficient to prove the requirement that the employment related injury resulted in external or internal physical harm to the claimant's body. By its vary nature, this injury has caused both temporary and permanent harm to the structural components of the claimant's lumbar spine, and possibly to his neural system. This would satisfy the second requirement for a compensable injury that is common to both Ark. Code Ann. §11-9-102(4)(A)(i) and §11-9-102(4)(A)(ii)(b).

For Ark. Code Ann. §11-9-102(4)(A)(i), this leaves three remaining definitional requirements, that the injury be caused by a specific incident, that the injury be identifiable by time and place of occurrence, and that the injury require medical services or result in disability. For Ark. Code Ann. §11-9-102(4)(A)(ii)(b) this leaves only one definitional requirement that the injury be to the claimant's back or neck and the requirement of Ark. Code Ann. §11-9-102(4)(E)(ii). For the sake of brevity, only the requirements of Ark. Code Ann. §11-9-102(4)(A)(ii)(b) and §11-9-102(4)(E)(ii) will be discussed in detail.

Unquestionably, the compensable injury in question in this claim was to the claimant's back or lumbar spine. Thus, the claimant has proven the final definitional requirement for a "compensable injury" under Ark. Code Ann. §11-9-102(4)(A)(ii)(b).

while it is quite possible that the claimant may have previously experienced bulging of the L5-S1 disc, which would explain his previous episodes of left sided lumbar difficulties, the evidence presented (particularly the expert medical opinion of

Dr. Queeney) supports the conclusion that the actual complete tear or herniation of the annulus of the disc did not occur until November 14, 2006. Based on the evidence presented, the claimant's employment related activities for this respondent, on November 14, 2006, is the only likely or probable cause of the complete tear or rupture of the annulus of the L5-S1 intervertebral disc with resulting extrusion of interior disc material and impingement on the exiting left S1 nerve root. Clearly, the sole cause for the claimant's need for treatment for his lower back and radicular difficulties in his left leg and any disability produced by these difficulties (either temporary or permanent) was this complete tear of the L5-S1 annulus and resulting left S1 nerve root impingement. Thus, the claimant's employment activities, on November 14, 2006, that produced this tear would also be the "major cause" of his need for the medical services he subsequently received from Dr. Holder, the emergency room of St. Edwards Mercy Medical Center, Dr. Joseph Queeney, and Dr. Scott Blumenthal. These employment activities, on November 14, 2006, would also be the "major cause" of the disability, both temporary and permanent, caused by the effects of this complete tear or rupture of the L5-S1 intervertebral disc and resulting nerve root impingement. Thus, the claimant has proven the final requirement for a "compensable injury", as that term is defined by Ark. Code Ann. §11-9-102(4)(A)(ii)(b).

It is also my opinion that the claimant has satisfied the statutory requirements for a "compensable injury", as defined by Ark. Code Ann. §11-9-102(4)(A)(i). Clearly, the claimant's

employment related injury was of such a nature and magnitude as to reasonably require medical services and result in disability (both temporary and permanent). I recognize that the claimant cannot identify a particular single employment related event, on November 14, 2006, as the cause of the onset of his lower back and radicular symptoms. Thus, it could be argued that he had failed to prove that these difficulties were caused by a "specific incident" and that he had failed to prove the occurrence of an injury that was identifiable by time and place of occurrence. However, the Act itself, does not define the term "specific incident". Nor, does the Act delineate any particular limits or boundaries to be used in determining whether an injury is sufficiently limited by time and circumstances to constitute a "specific incident". Clearly, a "specific incident", as this term is used in common language, implies a particular event or limited series of events that is sufficiently distinguishable from other events as to give it individuality. In the present case, the evidence shows that the claimant's injury was caused by the certain particular and identifiable employment activities, which he was performing for the respondent, between 6:30 p.m. and 11:00 p.m. on November 14, 2006 (i.e. prolonged bending over at the waist). It is my opinion that the described mechanism of injury is sufficiently distinguishable from other activities and is sufficiently limited in time for it to constitute a "specific incident" and to adequately identify the resulting injury by time and place of occurrence.

II. BENEFITS

Clearly, the claimant is entitled to reasonably necessary medical services for his compensable lumbar injury. However, the burden rests upon the claimant to prove that the actual services provided constitute reasonably necessary medical services under Ark. Code Ann. §11-9-508. Medical services are “reasonably necessary” when their purpose is connected with the compensable injury and they have a reasonable expectation of accomplishing that purpose, at the time the services were rendered.

In the present case, the evidence presented shows that the medical services provided the claimant for his lumbar and radicular difficulties, on and after November 16, 2006, by and at the direction of Dr. Keith Holder, the personnel at the emergency room of St. Edwards Mercy Medical Center, and by and at the direction of Dr. Scott Blumenthal were all necessitated by or connected with his compensable injury of November 14, 2006. The evidence further shows that these medical services were of a type and nature recognized by the general medical community as being appropriate and reasonable for the evaluation and treatment of injuries such as that experienced by the claimant.

Therefore, I find that these medical services represent “reasonably necessary medical services”, under Ark. Code Ann. §11-9-508. Pursuant to the provisions of this subsection, the respondents are liable for the expense of these services. However, this liability is limited by the Commission’s medical fee schedule.

The claimant also seeks temporary total disability benefits from November 18, 2006 through February 18, 2007. Again, the burden rests upon the claimant to prove his entitlement to such 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 injury. He must also prove that he continued to be rendered totally disabled from performing forms of regular gainful employment by his compensable injury.

The issue of the duration of the healing period is a medical question and 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 has either resolved or at least stabilized, 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.

In the present case, the medical evidence shows that the claimant was under continuous active medical treatment from November 16, 2006 through December 15, 2006. On December 15, 2006, the claimant underwent a left sided discectomy L5-S1 by Dr. Scott Blumenthal. No further medical records, authored after that date, have been introduced. However, the claimant testified that he last saw Dr. Blumenthal on March 6, 2007, at which time he was released

from further active medical treatment. This would have been less than three months following his surgery. Although this is a relatively short period of time for recuperation following this procedure, I am inclined to accept the claimant's testimony as accurate. Therefore, the claimant has proven that he continued within his healing period from the effects of his compensable injury from November 14, 2006 through March 6, 2007.

The claimant testified that he returned to work for the respondent on February 19, 2007 and has continued to work there through the present. The claimant had initially been sent home from work by the respondent on November 18, 2006. On November 27, 2006, Dr. Holder had medically restricted the claimant from engaging in any employment, until he was released by a neurosurgical specialist. There is no evidence that this medical restriction was lifted prior to the claimant's return to employment on February 18, 2007. It is my opinion that the claimant has proven that he was rendered totally disabled from performing all forms of regular gainful employment by his compensable lumbar injury from November 18, 2006 through February 18, 2007. Thus, he has satisfied the remaining requirement for his entitlement to temporary total disability benefits during the period of November 18, 1006 through February 18, 2007.

FINDINGS OF FACT & CONCLUSIONS OF LAW

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

2. On November 14, 2006, the relationship of employee-employer existed between the parties.

3. On November 14, 2006, the claimant earned wages sufficient to entitle him to weekly compensation benefits of \$488.00 for total disability and \$366.00 for permanent partial disability.

4. On November 14, 2006, the claimant sustained a compensable injury to his lumbar spine in the form of a complete tear or rupture of the annulus of the L5-S1 intervertebral disc with an extrusion of internal disc material and resulting impingement or compression on the thecal sac and left S1 nerve root. Specifically, the claimant has established by medical evidence, which is supported by objective findings, the actual existence of this physical injury. He has further proven by a preponderance of the evidence that this physical injury arose out of and occurred in the course of his employment with this respondent, caused internal physical harm to his body, and constituted an injury to his back. He has further proven by a preponderance of the evidence that his employment related injury was the major cause for his need for medical services and resulted in disability.

5. The medical services provided to the claimant for his lumbar and radicular difficulties, on and after November 16, 2006, by and at the direction of Dr. Keith Holder, personnel at the emergency room of St. Edwards Mercy Medical Center, and Dr. Scott Blumenthal constitute reasonably necessary medical services, under Ark. Code Ann. §11-9-508. Pursuant to the provisions of this subsection, the respondents are liable for the expense of the

services, subject to the medical fee schedule established by this Commission.

6. The claimant was rendered temporarily totally disabled as a result of the effects of this compensable injury for the period beginning November 18, 2006, and continuing through February 18, 2007. The claimant has proven by the greater weight of the credible evidence that during this time he continued with his healing period from the effects of his compensable injury and was rendered totally disabled from regular gainful employment by this injury.

7. The respondents have denied the occurrence of any compensable injury and have controverted this claim in its entirety.

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

ORDER

The respondents shall pay temporary total disability benefit for the period beginning November 18, 2006 and continuing through February 18, 2007. The respondents shall be liable for the medical services provided to the claimant by and at the direction of Dr. Holder, the emergency room of St. Edwards Mercy Medical Center, and Dr. Blumenthal. This liability is subject 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 controverted temporary

total disability benefits awarded 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 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