

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F701170

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| MICHAEL RIGGS                                      | CLAIMANT   |
| B & S CONTRACTORS, INC.                            | RESPONDENT |
| CONTINENTAL WESTERN INSURANCE<br>INSURANCE CARRIER | RESPONDENT |

OPINION FILED OCTOBER 26, 2007

Hearing before ADMINISTRATIVE LAW JUDGE ELIZABETH DANIELSON in Springdale, Washington County, Arkansas.

Claimant represented by JAMES EVANS, JR., Attorney, Springdale, Arkansas.

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

STATEMENT OF THE CASE

A hearing was held on August 14, 2007, in Springdale, Arkansas.

At the conclusion of the hearing it was determined that a change of physician request had been filed at the time a hearing was requested. This case, therefore, was returned to Little Rock to Cost Containment for a change of physician order. On September 25, 2006, an order was entered granting the claimant a change of physician from Dr. Constantine Berestnev to Cyril Raben.

A pre-hearing conference was held in this claim, and as a result a pre-hearing order was entered in the claim on June 12, 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 September 14, 2006, the relationship of employee-employer-carrier existed between the parties.

3. The claimant sustained a compensable injury to his low back.

4. The claimant is entitled to a weekly compensation rate of \$488.00 for temporary total disability and \$366.00 for permanent partial disability.

5. Some medical and temporary total disability has been paid.

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

1. Additional temporary total disability from October 6, 2006, to February 8, 2007, and from March 1, 2007, to a date to be determined.

2. Attorney's fees.

The claimant reserves the issue of his entitlement to additional medical.

In regard to the foregoing issues the claimant contends that he was injured on September 14, 2006. He received an injury to his back when a scaffold hit him knocking him to the ground.

In regard to the foregoing issues the respondents contend that the claimant was injured on September 14, 2006. This was treated as a medical only claim. The claimant was laid off on October 6, 2006, and then filed for unemployment benefits. Subsequent to this, the claimant was sent to Arkansas Occupational Health Clinic

with complaints of numbness in his leg and left thumb. His exam indicated that he could heel and toe walk and had full range of motion of the shoulders. The x-rays of the thoracic and lumbar spines showed osteophytes, which are degenerative in nature. Dr. Berestnev noted that the claimant could not bend past the knees and felt that some of his problems were psychological in nature. He also noted the x-rays showed spondylolisthesis. He ordered an MRI, which showed disc bulging at various levels. Dr. Berestnev indicated in his report that he explained to the claimant and his wife that his problems pre-existed his injury. On April 15, 2007, the claimant returned to Dr. Berestnev indicating that the numbness was gone. He was still having back pain, but had a normal exam. Dr. Berestnev noted the claimant had positive waddell's indicating non-organic problems. He reiterated that there was dessication of all the discs that was degenerative in nature and released the claimant from his care. The claimant has now requested a change of physician to Dr. Raben. It is anticipated that the change of physician will be granted by the Commission.

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

## DISCUSSION

Rodney Woodard testified that he has been acquainted with the claimant for approximately two and a half years and has worked with him in the past. Mr. Woodard testified that he and the claimant worked together for Cornerstone Masonry for about a year and then they were laid off and got hired by the respondent. Mr. Woodard testified that in September 2006 he and the claimant were working for the respondent and the claimant rode back and forth to work with him. Mr. Woodard testified that on September 14, 2006, co-employees dropped a two hundred-pound ladder which hit the claimant and knocked him down. Mr. Woodard testified that the employees who were working above the claimant told him they had dropped the ladder and hit the claimant and asked him to go check on the claimant. Mr. Woodard testified that they were working approximately forty feet off the ground. Mr. Woodard testified that when he found the claimant he was at the trailer office and looked real dazed. Mr. Woodard testified that he took the claimant to the hospital at Springdale that day. Mr. Woodard testified that he thinks the claimant was off work for a couple of days. Mr. Woodard testified that the claimant rode back and forth with him to work for about two weeks and on October 6, 2006, they both were laid off along with some other individuals. Mr. Woodard testified that the other people who were laid off were the individuals who told him they had dropped the ladder on the claimant. Mr. Woodard testified that during the period of time that the claimant rode with him to work after his accident the

claimant appeared to be totally different and he even had to leave early or miss a day or two of work during this period of time. This witness stated that the claimant was always complaining about his back hurting and that he could hardly make it through the day. Mr. Woodard agreed that he would describe the claimant's condition as progressively getting worse. Mr. Woodard testified that currently he is working for McBride Masonry but is not working with the claimant. This witness testified that for the two and a half years that he had known the claimant the claimant had always ridden back and forth to work with him. Mr. Woodard testified that when the claimant did return to work for the respondent for that week and a half to two weeks he was placed on a lighter duty type work.

On cross examination, Mr. Woodard testified that in the masonry field when a job is complete if there is not other work lined up individuals will be laid off. After much discussion about the number of people who were laid off on October 6, 2006, Mr. Woodard testified that he had no idea why they were laid off, he just knows that he was laid off. Mr. Woodard testified that he has seen the claimant probably two or three times since they were laid off and thinks he saw the claimant about a month prior to this hearing. This witness was asked if he was aware of the claimant having any other health problems or the claimant taking Aleve almost daily and Mr. Woodard responded, "No."

On redirect examination, Mr. Woodard testified that the building which he and the claimant were working on when they were laid off was not completely finished. Mr. Woodard was asked if it

was common to get laid off when you are a brick layer and the brick has not been finished yet. This witness responded by stating, "It just depends. I mean, it-it depends on how many people there is, and how--you know, if its winding down."

On recross examination, Mr. Woodard was asked if the building was pretty close to being finished and he responded that yes it was getting close.

The claimant testified that he has been doing masonry work for at least twenty-five years. The claimant testified that prior to September 14, 2006, during the twenty-five years he worked as a mason he did not have any reason he could not go to work. The claimant testified that he could not remember the exact date when he went to work for the respondents but he had been working for them for sometime as a brick layer-mason. The claimant testified that on September 14, 2006, he was working on scaffolding about thirty to forty feet off the ground bending over laying brick. The claimant testified that he heard someone holler but he just kept on working and then all of a sudden something hit him in the back. The claimant remembered that he bolted upright, looked around and saw a couple of Mexican guys back off and then the man working next to him, Roy, asked if he was all right and he told Roy that he did not know. The claimant testified that he sat down on the scaffolding and then said he was going down to the truck to report the incident to Brett. The claimant testified that he reported the event to Brett and also told Brett that he was going over to Rodney's truck because something feels wrong. The claimant

testified that Brett told him to let him know if he needed to go anywhere. The claimant testified that over a period of time his back continued to get worse so he went back to tell Brett he was going to the hospital but could not find Brett. The claimant agreed that Mr. Woodard showed up and drove him to the hospital. The claimant testified that he was taken to the Northwest Medical Center where he was seen by a physician. The claimant testified that he was off work longer than three or four days but that the respondent kept calling him asking him when he was going to be able to return to work. The claimant testified that he had a doctor's note which his wife took to the respondent releasing him from work. The claimant testified that his wife gave the note to either Brett or Ted. The claimant testified that the doctor at the ER recommended that he seek other medical care. The claimant testified that he was not seen by another doctor between the time he returned to work and the time he was laid off by the respondent. The claimant testified that he asked to be seen by a doctor although he did not do it personally that it was his wife who talked to Sue who works in the respondent's office. The claimant testified that when he did return to work for the respondent he was doing lighter work rubbing down the blocks. The claimant agreed that this lighter job did require bending and stooping but he was able to do the work. The claimant testified that on the day that he as well other men were laid off they were told that they did not have a job, given their checks, and left the work site. The claimant testified that besides himself, Rodney Woodard was laid

off as well as a few other people which included the Hispanic gentlemen who were there when he got hurt. The claimant testified that on October 6, 2006, when he was laid off he feels he would be able to lay brick but he would not be able to lay cinder blocks. The claimant testified that after he was laid off on October 6 he applied for unemployment and drew benefits for eight to ten weeks in the amount of \$270.00 per week. The claimant testified that he was never allowed to see the doctor that the hospital had recommended to him. The claimant testified that between October 6, 2006, and the time he was seen by a physician on February 8, 2007, he was unable to work. The claimant testified that he has pain in his lower back which runs down his leg as far down as into his calf on the right. The claimant testified that his discomfort has not gotten any better since October 6, 2006. The claimant testified that he was treated by Dr. Konstantin Berestnev from February 8, 2007, until March 1, 2007. The claimant testified that he had great difficulty understanding what Dr. Berestnev was saying to him. The claimant testified that he was sent to physical therapy and when he was released to return to work Dr. Berestnev had recommended that he go back to work but take it easy. The claimant testified that when the doctor released him he was still having pain in his right leg. The claimant testified that he gets relief after he takes a couple of Aleve or if he drinks a couple of cold beers. The claimant agreed that the medications which the doctors prescribed for him did relieve his discomfort but he has been out of that medication since March. The claimant testified that he has

not gone back to work anywhere nor has his physical condition gotten any better. The claimant testified that he started using a cane about four months prior to this hearing but no doctor prescribed it. The claimant testified that he has asked a couple of people for work but has not been employed. The claimant testified that most of his working career has been doing masonry work and he does not feel he is capable of doing that type of work currently. The claimant agreed that he still has pain and tingling which sometimes goes into his foot.

The claimant testified on cross examination that pain into his leg did not begin immediately but was present at the time he was seen at the ER. The claimant was shown the ER records and diagrams and agreed that it did not appear that any leg pain was reported. The claimant testified that the jack or ladder that hit him weighed over a hundred pounds and fell approximately ten feet onto his right shoulder and back as he was bent over working. The claimant does remember that when he was at the ER he reported pain in his right shoulder and right side of his back. The claimant testified that while at the ER he reported that he takes a multivitamin daily but does not recall telling the personnel that he took Aleve daily. The claimant was shown an off work slip excusing him from work from September 14 to September 16 which the claimant believed to be the note his wife took to the respondent. The claimant agreed that after he was laid off he filed for unemployment indicating that he was laid off because of lack of work. The claimant testified that it is not unusual to be laid off in the winter because masonry work

is seasonal. The claimant testified that after his unemployment benefits ran out he told his wife that he really needed to go see a doctor because his back was getting worse. The claimant agreed that shortly after this he was sent to see Dr. Berestnev. The claimant testified that he saw Dr. Berestnev on February 8 and when asked specifically from Dr. Berestnev's report the claimant disagreed with the doctor's report indicating that perhaps the doctor did not understand him. The claimant testified that Dr. Berestnev prescribed physical therapy and that he would have physical therapy each time he would see the doctor. The claimant testified that the doctor prescribed home exercises for his back. The claimant testified that the exercises which were given him by the physical therapist bothered him so he stopped doing them. The claimant testified that currently he just walks around with his cane and when he lays down on the couch he props his feet up. The claimant testified, "Just getting up and down out of bed is exercising right now. Because the more I try to move around the worse it hurts." The claimant testified that he has cut back his smoking to five or less cigarettes per day and although the doctor has not recommended that he lose weight he knows that he does need to lose weight. The claimant agreed that the amount of Aleve he was taking prior to his accident is approximately the same amount he is currently taking for his back. The claimant testified that he does have metal fragments in his eye due to a wire brush, was operated on for a gun shot wound when he was fourteen years old, currently has a hernia, was involved in a bike accident which broke

his right leg, and does not have a driver's licence due to seizures since 1995. The claimant testified that during the period of time he was being seen by Dr. Berestnev he did not have numbness but he did have pain. The claimant understood that his MRI revealed that he had some arthritis but that the doctor talked more to his wife than to him. The claimant testified that he usually sleeps about six hours a night and still gets up about 4:00 in the morning. The claimant disagreed with Dr. Berestnev's assessment that he was in no particular distress because he still has pain. The claimant testified that Dr. Berestnev released him to return to work as a mason but to take it easy. The claimant agreed that no doctor since he was seen by Dr. Berestnev has taken him off work. The claimant testified that his next step is to file for social security. When asked, the claimant testified that he was out of work in 1999 and 2000 due to being incarcerated for attempting to manufacture drugs. The claimant read from a Form 3 which indicated that he could return to work on March 1, 2007, with no restrictions.

On redirect examination, the claimant was read from one of the physical therapy reports that he was reporting pain down his right posterior and lateral aspects of his right hip which the claimant agreed he had reported to the physical therapist. The claimant was then read from Dr. Berestnev's order of an MRI for his lumbar and right sided radiculopathy. The claimant agreed that at that time he was having pain running down the right side of his leg down across his hip and into his legs. The claimant testified that he

was reporting pain in his right thigh on February 26 which was approximately five days before Dr. Berestnev released him with no restrictions. The claimant testified that at the time he was released by the doctor he was given another shot because he was going to physical therapy after he left the doctor's office. The claimant agreed that at the time of his release he was also given a prescription for Percocet. The claimant agreed that when he was last seen by the physical therapist on March 8 he was still reporting pain down his left and right leg with some tingling and numbness in the left foot. The claimant testified that the only medical treatment he has had since he was last seen by the physical therapist was at the emergency room in Springdale. The claimant testified that when he coughs it causes pain in his lower back which goes down into his hip.

On recross examination, the claimant was asked if he had any off work slips except for the off work slip dated September 14 through September 16, 2006, and then from February 8 through March 1, 2007. The claimant responded, "No, not to my knowledge."

Mary Katherine Riggs testified that she is the claimant's wife and was married to him on September 14, 2006. This witness testified that she received a phone call from her husband saying that he was going to the hospital and she arrived at the hospital approximately the same time her husband did. Mrs. Riggs testified that she and Rodney helped the claimant into the ER. Mrs. Riggs testified that the physicians gave her husband an off work slip as well as referred him to another physician. Mrs. Riggs testified

that she gave the off work slip to Brett and that the claimant never did see the doctor whom he was referred to. Mrs. Riggs testified that when her husband returned to work for the respondent he was still hurting, could not stand up straight, and was hobbling. This witness testified that during the period of time that the claimant worked for the respondent after his accident he continued to get worse. Mrs. Riggs testified that she began calling the respondent to try to find out who their company doctor was so that the claimant could be seen. Mrs. Riggs testified that after several calls she eventually was contacted by the respondents and told to send the claimant's medical bills to them. Mrs. Riggs testified that it was at this time that the claimant began being seen by Dr. Berestnev. Mrs. Riggs testified that she took her husband to each of his medical appointments and would be present during the evaluation. Mrs. Riggs testified that it was difficult to understand Dr. Berestnev. Mrs. Riggs testified that at each of the claimant's doctor's appointments he complained about pain in his right leg. Mrs. Riggs testified that the only medical treatment the claimant has received since he was last seen in physical therapy was a visit to the emergency room due to the claimant being in such pain. Mrs. Riggs testified that once or twice a week the claimant will wake up in the middle of the night and she will have to help him up out of the bed, get him into a recliner, and then she will apply heat and ice. This witness testified that she never had to do any of this prior to September 14, 2006. This witness was asked how the claimant's condition has

progressed since the date of his accident in September 2006. Mrs. Riggs testified that his shoulder has gotten much better and they are not as sore as they were at first but that his back has gotten continually worse. Mrs. Riggs testified that up until the date of the claimant's accident he worked every day without pain or discomfort.

On cross examination, Mrs. Riggs stated that she was aware that the claimant took Aleve occasionally for the normal aches and pains due to his work. Mrs. Riggs testified that she was unaware that the claimant had arthritis in his back. Mrs. Riggs testified that she started calling the respondents asking for the claimant to be seen by a doctor soon after his accident. Mrs. Riggs testified that during the period of time the claimant was drawing unemployment she would drive him around to different masonry businesses where he would inquire about work.

On redirect examination, Mrs. Riggs testified that the claimant was released to go back to work on light duty and not to lift over twenty-five pounds. This witness testified that the claimant's tool bag itself weighs forty pounds because she has weighed it.

The medical records set forth that the claimant was seen at the Northwest Medical Center on September 14, 2006, reporting that a hundred and ten-pound ladder jack had fallen onto him just prior to his arrival and he had injured his back, shoulder, and hip. X-rays of the claimant's shoulders and right hip were normal, x-rays of the claimant's lumbar spine indicated some degenerative changes

otherwise normal, x-rays of the cervical spine were normal as were the x-rays of the claimant's chest although there was some degenerative change evidence in the thoracic area. The claimant was given an off work slip to be excused from work from September 14, 2006, to September 16, 2006, signed by Dr. Peter Ball. On February 8, 2007. Dr. Konstantin Berestnev writes that the claimant reports that as a result of his work related injury he has sharp pain in his right shoulder and lower back area as well as pain in his back and numbness and tingling in his legs. Dr. Berestnev notes that the claimant reports that he was advised to see an orthopedist but the insurance company did not approve this visit so he has not seen a doctor since his ER visit. The claimant reports that he continues to have pain which radiates down to his lower extremities and specifically stated that his left foot is numb. The claimant also reports that his shoulder feels a little better but occasionally he has sharp pain radiating down to his low back. After examination and review of the claimant's x-rays of his thoracic and lumbar spine Dr. Berestnev assesses the claimant with low back pain, left foot paresthesias, and some psychosocial circumstance with the way his injury was handled. Dr. Berestnev prescribed medication and advised the claimant to do stretching exercises for his lower back and shoulders at home. The doctor recommended that the claimant undergo an MRI of his lower back. The claimant was released to return to work on February 8, 2007, with a lifting restriction of no more than twenty pounds. The claimant underwent an MRI of his lumbar spine on February 14, 2007,

which indicates that he has a straightening of the normal lumbar lordosis, dissection of all intervertebral discs with moderate loss of vertical height at L3-4 and L4-5, moderate annular disc bulging at L3-4 and L4-5 extending into the neuro exit foramina bilaterally at each of these levels most pronounced at L3-4, possible far lateral right L3-4 disc protrusion lateral to the neuro exit foramen with mild central channel stenosis at this level, moderate narrowing of the right L4-5 neuro exit foramen but no complete obliteration of the epidural fat along the existing nerve root, and moderate degenerative facet arthropathy at all levels. When Dr. Berestnev saw the claimant on February 15, 2006, he had not yet received the results of the claimant's MRI. The doctor notes that the claimant reports that he does not have any paresthesias any more but continues to have back pain of the same intensity. Dr. Berestnev assesses the claimant with having low back pain again noting that he has some psychological factors dealing with his workers' comp claim. Dr. Berestnev recommended physical therapy for the claimant's lower back as well as to take anti-inflammatory medications during the day. Dr. Berestnev continued the claimant on restrictions to avoid lifting more than twenty pounds. On February 26, 2007, the claimant's physical therapist after examination and evaluation of the claimant assesses him with demonstrating signs consistent with a facet strain at L5-S1 noting that he would benefit from physical therapy to decrease his symptoms and to improve his function. This physical therapist notes that the claimant has a radicular component to his pain with

diminishing strength at the extender hallucis longus noting that it is resolving because he is no longer having numbness in that dermatome. The therapist recommended a modality to help to resolve the claimant's spasm as well as therapeutic exercises and home exercises. Dr. Berestnev writes on March 1, 2007, that the claimant reports that he no longer has any paresthesias in his left foot but that he continues to have back pain but not as intense. Dr. Berestnev writes that he explained the claimant's MRI informing the claimant that the majority of the findings were degenerative in nature and not as a result of his accident. Dr. Berestnev writes that the claimant asked if he could return to his duties as a mason which the doctor indicated he could. After examination, the claimant was assessed with low back pain which was healing and the claimant was injected with medications and sent to physical therapy. The doctor prescribed pain medications to be taken at nighttime as needed. The claimant was encouraged to complete his physical therapy sessions as well as to continue with his home exercises and to familiarize himself with safe lifting techniques. Dr. Berestnev released the claimant to his regular duties as a mason. The claimant attended four physical therapy sessions and in each he complained of pain through his right hip as well as pain down his left and right leg, and on the claimant's last physical therapy session he reported pain down the right posterior and lateral aspect of his right hip.

After a complete review of this entire matter, I find that the claimant has failed to prove by a preponderance of the evidence

that he is entitled to temporary total disability from October 6, 2006, to February 8, 2007. The claimant has testified that he was laid off by the respondent as a result of lack of work and collected unemployment benefits subsequent to his termination. The claimant has testified that it was not until his unemployment benefits ran out that he once again sought medical treatment for his back discomfort. It is also noted that when the claimant was seen at the ER on the date of his accident on September 14, 2006, he was released for work for two days only to return to work with no notation of restrictions. I also find that the claimant has failed to prove by a preponderance of the evidence that he is entitled to temporary total disability from March 1, 2007, to a date to be determined. The claimant had been receiving treatment by Dr. Berestnev beginning in February 2007 and when the doctor released him on March 1, 2007, he specifically set forth that the claimant could return to his regular duties as a mason. The claimant has testified that he has not sought additional medical treatment since seeing Dr. Berestnev although it is noted that he did request a change of physician which has been granted subsequent to the date of the initial hearing in this matter. As per this record, there is no record that any physician has taken the claimant off work since March 1, 2007. Therefore, this claim for benefits during the periods of time set forth should be denied.

#### FINDINGS & CONCLUSIONS

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

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

3. The claimant sustained a compensable injury to his low back.

4. The claimant is entitled to a weekly compensation rate of \$488.00 for temporary total disability and \$366.00 for permanent partial disability.

5. Some medical and temporary total disability has been paid.

6. The claimant has failed to prove by a preponderance of the evidence that he is entitled to temporary total disability from October 6, 2006, to February 8, 2007, and then from March 1, 2007, to a date to be determined.

ORDER

The claimant has failed to prove by a preponderance of the evidence that he is entitled to temporary total disability from October 6, 2006, to February 8, 2007, and then from March 1, 2007, to a date to be determined. Therefore, this claim for additional temporary total disability should be denied in its entirety.

IT IS SO ORDERED.

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ELIZABETH DANIELSON  
ADMINISTRATIVE LAW JUDGE