

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F705427

KENNY SHADDOCK	CLAIMANT
SUPERIOR INDUSTRIES SELF INSURED	RESPONDENT
CROCKETT ADJUSTMENT, TPA	RESPONDENT

OPINION FILED NOVEMBER 16, 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 CURTIS NEBBEN, Attorney, Fayetteville, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above styled claim on October 1, 2007, in Springdale, Arkansas. A pre-hearing order was entered in this case on July 23, 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 parties agreed on the appropriate weekly compensation rates and the claimant requested that the issues be amended to reflect that the claimant was only seeking temporary total disability benefits from May 27, 2007 through a date yet to be determined. A copy of this pre-hearing order with those 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 April 30, 2007, the relationship of employee-self insured employer-TPA existed between the parties.
2. The appropriate weekly compensation rates are \$369.00 for total disability and \$277.00 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 neck or cervical spine on April 30, 2007.
2. The claimant's entitlement to medical services, temporary total disability from May 27, 2007 through a date yet to be determined and attorney's fees.

In regard to these issues, the claimant's contentions in his prehearing questionnaire are obviously from a different case. The claimant actually contends that he injured his cervical spine in a specific employment related incident on April 30, 2007, and is entitled to reasonably necessary medical services, temporary total disability benefits from May 27, 2007 through a date yet to be determined, and attorney's fees.

In regard to these issues, the respondents contend:

"The respondents contend that the claimant did not sustain an injury arising out of and in the course of his employment as defined by the Arkansas Workers' Compensation Act."

DISCUSSION

I. COMPENSABILITY

The first issue is whether the claimant sustained a “compensable injury” to his neck or cervical spine, as the result of a specific employment related incident on April 30, 2007. The burden rests upon the claimant to prove all of the facts required to establish the occurrence of a “compensable injury”, as that term is used in the Act.

Under Ark. Code Ann. §11-9-102(4)(D), the claimant must prove by medical evidence, the actual existence of the physical injury or damage alleged to be compensable. Further, the claimant must show that the actual existence of this physical injury or damage is supported by “objective findings”, as that term is defined by Ark. Code Ann. §11-9-102(16)(A)(i).

The medical evidence in this case clearly establishes the existence of a physical injury or defect to the claimant’s cervical spine, which is in the form of a herniated intervertebral disc at the C6-7 level and arthritic changes and spurring of the adjacent vertebral bodies. The medical evidence further shows that the presence of this herniated disc and arthritic spurring is supported by abnormalities noted on cervical x-rays and a cervical MRI study. Therefore, I find that the claimant has satisfied the statutory requirements for a “compensable injury” that are contained in Ark. Code Ann. §11-9-102(4)(D).

The claimant must next prove that this medically established injury satisfies the five definitional requirements of Ark. Code Ann. §11-9-102(4)(A)(i). These definitional requirements are:

- (1) the injury arose out of and occurred in the course of his employment;
- (2) the injury was caused by a specific incident;
- (3) the injury is identifiable by time and place of occurrence;
- (4) the injury caused internal or external physical harm to his body; and
- (5) the injury required medical services or resulted in disability.

In order to satisfy the first three of these definitional requirements, the claimant must show a causal relationship between his cervical difficulties on and after April 30, 2007, and a specific employment related incident. However, it is not necessary that he prove the existence of this causal relationship to an absolute or even mathematical certainty. It is only necessary that the described specific employment related incident, on April 30, 2007, was the most likely or probable cause of his subsequent cervical difficulties. Further, it is not necessary that the claimant prove that this specific employment related incident, on April 30, 2007, was the sole or even "major" cause of his subsequent cervical difficulties. It is only necessary that he prove that this incident was a cause of these difficulties.

The claimant testified that he was hired by the respondent in mid February of 2007. He described his required employment duties

as requiring him to repeatedly pick up metal automobile wheels or rims and hang them onto a moving line for further processing. He testified that he had no problems with his neck, right shoulder, or right arm, prior to April 30, 2007. He stated that, on April 30, 2007, while he was hanging a 40 to 50 pound wheel, he heard a “pop” and his right arm became numb and tingly. He stated that he immediately reported the incident and his resulting difficulties to a tech trainer, by the name of Sheri, and that Sheri took him to the guard shack. When they arrived at the guard shack, the guard called a “first responder”, by the name of Shawn. Shawn placed an ice pack on the back of his neck and then took him to Mercy Medical Center, where he was evaluated and treated by Dr. David Sitzes.

The initial reports and record of Dr. Sitzes record a history of an incident and onset of difficulties identical with that given by the claimant in his testimony. Dr. Sitzes also noted that the claimant reported a vaguely recalled neck injury when he had played football in high school. During this initial evaluation Dr. Sitzes obtained cervical x-rays and a cervical MRI on the claimant. These tests revealed the presence of degenerative arthritic changes at the C6-7 level and a herniated intervertebral cervical disc. It was the expert medical opinion of Dr. Sitzes that this herniated cervical disc was “acute” or recent.

The records of Dr. Sitzes show that he continued to treat the claimant with various conservative modalities, such as muscle relaxers, anti-inflammatories, pain medication, and physical therapy. Ultimately, Dr. Sitzes referred the claimant for a

neurosurgical evaluation and possible treatment by Dr. Richard Kyle, a neurosurgeon at Neurosurgical Associates of northwest Arkansas.

The records of Dr. Kyle reveal that he initially saw the claimant on June 4, 2007. The history of the onset of the claimant's difficulties, which were recorded by Dr. Kyle, coincides with that given by the claimant in his testimony. After his initial evaluation of the claimant and review of the claimant's prior tests, Dr. Kyle indicates that it is his expert medical opinion that the claimant was suffering from a bilateral disc herniation at C6-7, that appeared to be chronic on the left and "acute" or recent on the right. Dr. Kyle recommended neurological testing of the claimant's right upper extremity, in the form of an EMG-NCS. He indicated that appropriate follow up care would be provided upon completion of this testing.

However, at this point, the respondents appear to have denied any further liability for the claimant's cervical difficulties and refused to authorize any further medical tests or treatment at their expense. Due to a lack of finances, the claimant has been unable to obtain the recommended testing or any further follow up care. This was also shortly after the claimant's termination.

After consideration of all the evidence presented, it is my opinion that the claimant has proven that the specific employment related lifting incident, on April 30, 2007, was the most likely or probable cause of his cervical and right upper extremity difficulties, on and after that date. Clearly, the lifting and

maneuvering of the 40 to 50 pound rim, which was described by the claimant, could have reasonably caused a herniation of the C6-7 intervertebral disc. Further, I find the claimant's testimony to be credible and sufficient to prove the existence of a close temporal relationship between this employment related lifting incident and the initial onset of symptoms, which would be indicative of the occurrence of this disc herniation.

I have also placed substantial weight on the expert medical opinions of Dr. Sitzes and Dr. Kyle that the observed C6-7 disc herniation was "acute" or recent. Both are licensed physicians and Dr. Kyle is a board certified neurosurgeon with particular expertise in the area of spinal injuries and conditions.

I would note that the only other possible causes of the herniation of the claimant's C6-7 intervertebral disc, which are shown by the evidence presented, would be the high school football incident and a motor vehicle accident in 1989. However, it is impossible to conceive that the claimant could have been suffering from the disc herniation and resulting stenosis or impingement that is demonstrated by the MRI study for a period of many years without seeking some form of medical treatment. It is even more impossible to conceive that the claimant would be capable of performing rather strenuous and stressful employment activities for this respondent for several months without noticeable difficulty or complaint. The likelihood of either of these two incidents being the cause of the claimant's current cervical and upper extremity difficulties is essentially nil.

I recognize that the MRI study was interpreted as showing the presence of degenerative arthritic changes or spurring, which was also contributing to the stenosis or right neuroforaminal encroachment of the exiting nerve roots at the C6-7 level. Clearly, this degenerative arthritic spurring developed over a considerable period of time and obviously pre-existed the incident of April 30, 2007 and even the claimant's employment with this respondent, in general. Although the degenerative arthritic changes may be playing some causal role in the right lateral recess stenosis and right neuroforaminal encroachment on the exiting nerve roots at the C6-7 level and resulting symptoms, it is clearly not the sole cause or even likely the major cause of these difficulties. Both the interpretation of the MRI study and the records of Dr. Kyle show that the claimant's current difficulties are the result of impingement caused by a combination of the pre-existing arthritic spurring and the acute or recent herniation of the C6-7 intervertebral disc.

It is my further opinion that the claimant has proven that the employment related cervical injury of April 30, 2007, has resulted in internal harm to the claimant's body and was sufficient to reasonably require medical services and result in disability. Clearly, the MRI study demonstrates actual physical damage to the C6-7 intervertebral disc and ongoing encroachment or pressure on the exiting nerve roots at this level. The very nature and magnitude of this injury is such that appropriate medical services and treatment would be required to correct or reduce this damage.

It is also apparent that this damage has resulted at least on a temporary basis, in significant limitations upon the claimant's potential employment activities that has been sufficient to produce actual disability.

In summary, I find that the claimant has proven all of the facts necessary to establish a "compensable injury" to the cervical spine under Ark. Code Ann. §§11-9-102(4)(A)(i) and (D).

II. REASONABLY NECESSARY MEDICAL EXPENSES

Under Ark. Code Ann. §11-9-508, the claimant would be entitled, at the respondents' expense, to "reasonably necessary medical services" for his compensable cervical injury of April 30, 2007. However, the burden still rests upon the claimant to prove that the medical services provided and recommended actually represent "reasonably necessary medical services" within the meaning of this subsection. Medical services are "reasonably necessary" when they are necessitated by or connected with the compensable injury and have a reasonable expectation of accomplishing their intended purpose or goal, at the time they are rendered.

A review of the medical services provided and recommended to the claimant by and at the direction of Dr. Sitzes and Dr. Kyle clearly show that all of these medical services were or are necessitated by or connected with the claimant's compensable cervical injury. The medical services provided and recommended by these physicians are of a type commonly recognized and actually employed by the medical community in this area for the evaluation and treatment of injuries such as that experienced by the claimant.

As such, they would be medically appropriate and would have a reasonable expectation of accomplishing the purpose or goal for which they are intended.

Therefore, I find that the medical services provided and recommended by Dr. Sitzes and Dr. Kyle represent “reasonably necessary medical services” as that term is used in Ark. Code Ann. §11-9-508. Pursuant to the provisions of this subsection, the respondents are liable for the expense of these services, subject to the medical fee schedule established by this Commission.

III. TEMPORARY TOTAL DISABILITY BENEFITS

The remaining issue is the claimant’s entitlement to temporary total disability benefits for the period beginning May 27, 2007 and continuing through a date yet to be determined. Again, the burden rests upon the claimant to prove his entitlement to these benefits. In order to meet this burden, the claimant must prove that he has continued from his healing period from the effects of his compensable injury and has been rendered totally disabled from performing all forms of regular gainful employment for which he would otherwise be qualified by this injury.

The record reveals that the claimant was returned to work by Dr. Sitzes after his initial evaluation. However, this release has substantial restrictions, which varied slightly over Dr. Sitzes course of treatment. Initially, the claimant was prohibited from lifting in excess of 10 pounds and to avoid the use of his right upper extremity. Subsequently, he was restricted from lifting in excess of 15 pounds, but with no use of his right arm and no

deviation of his neck. Due to the pain medication that had been prescribed, Dr. Sitzes also restricted the claimant from operating heavy machinery or driving. This latter restriction was subsequently amended by Dr. Sitzes to only restrict the claimant from driving or operating heavy equipment within six hours of taking his pain medication (Tramadol).

The evidence shows that the respondent appears to have initially provided the claimant with employment within these restrictions, and the claimant returned to work. However, the respondent terminated the claimant's employment on or about May 27, 2007, for missing three days from work, and no further light duty was provided.

The claimant testified that these three absences, which resulted in his termination, were the result of his inability to drive himself to work coupled with an inability to find alternate transportation. He also testified that prior to these absences, he requested assistance from the respondent in obtaining transportation to work, but this request was denied. Finally, he testified that on the three days he was absent, which resulted in his termination, he called into the respondent and advised them that he was unable to find transportation in to work. The records of Dr. Sitzes show that these absences occurred during the time Dr. Sitzes had restricted the claimant from driving entirely.

Clearly, the claimant's compensable injury of April 30, 2007, has continuously caused significant restrictions and limitations on his potential employment activities. This injury has resulted in

substantial restrictions on his lifting abilities and has significantly impaired the use of his right arm. When these restrictions are considered in light of the fact that during this same period he has continued under active medical treatment for a herniated cervical disc with resulting nerve impingement and will continue to require such treatment for an indefinite period in the future, the claimant's chances of obtaining any meaningful or regular gainful employment in the open job market is negligible at best. Certainly, the fact that he has been able to maintain substantially limited part time volunteer employment in the ministry field would not be evidence of his ability to perform full time regular gainful employment. The fact that the respondent also provided him, for a limited period, with substantially limited and essentially one-handed employment would in no way indicate that somewhere employment positions would be available to the claimant in the open job market.

The respondent elected to terminate the limited or light duty employment provided to the claimant for a violation of the respondent's policy on absenteeism. However, the greater weight of the credible evidence presented shows that the absences, upon which this violation was based, were the direct result of the claimant's compensable injury and in no way the result of the claimant's misconduct. While the respondent is certainly free to terminate the claimant, under its existing company policy, this termination would not foreclose the claimant from entitlement to temporary

total disability benefits, particularly under Ark. Code Ann. §11-9-526.

After consideration of all the evidence presented, it is my opinion that the greater weight of the credible evidence shows that the claimant has been rendered totally disabled from regular gainful employment by the effects of his compensable cervical injury from May 27, 2007 through a date yet to be determined. Thus, the claimant has satisfied the second requirement for his entitlement to temporary total disability benefits.

FINDINGS OF FACT & CONCLUSIONS OF LAW

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

2. On April 30, 2007, the relationship of employee-self employer-third party administrator existed between the parties.

3. On April 30, 2007, the claimant earned wages sufficient to entitle him to weekly compensation benefits of \$369.00 for total disability and \$277.00 for permanent partial disability.

4. On April 30, 2007, the claimant sustained an injury to his neck or cervical spine that was in the form of a herniation of the C6-7 intervertebral disc and resulting stenosis or impingement of the exiting nerve roots. Specifically, the claimant has proven by medical evidence, which is supported by objective findings, the actual existence of this physical injury. The claimant has further proven by the greater weight of the credible evidence that this injury arose out of and occurred in the course of his employment with the respondent, was caused by a specific incident, is

identifiable by time and place of occurrence, caused internal physical harm to his body, required medical services, and resulted in disability.

5. The medical services provided the claimant by and at the direction of Dr. David Sitzes and Dr. Richard Kyle constitute reasonably necessary medical expenses for the claimant's compensable injury. Further, the additional medical services recommended by Dr. Kyle also represent reasonably necessary medical services for the claimant's compensable injury. Specifically, the claimant has proven that these medical services were necessitated by or connected with his compensable injury, and have a reasonable expectation of accomplishing the purpose or goal for which they are intended. Pursuant to Ark. Code Ann. §11-9-508, the respondents are liable for the expense of these services, subject to the medical fee schedule established by this Commission.

6. The claimant has been rendered temporarily totally disabled, as a result of the effects of his compensable injury of April 30, 2007, for the period beginning May 27, 2007 and continuing through a date yet to be determined.

7. The respondents have denied the occurrence of any compensable injury to the claimant's cervical spine on April 30, 2007, 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 and hereinafter awarded directly to the claimant.

ORDER

The respondents shall pay to the claimant temporary total disability benefits for the period beginning May 27, 2007, and continuing through a date yet to be determined.

The respondents shall be liable for the expense incurred by the claimant as a result of reasonably necessary medical services provided him for his compensable injury by Dr. Sitzes and Dr. Kyle and shall further be liable for the expense of the additional medical services recommended by Dr. Kyle. Such liability shall be 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 temporary total disability benefits herein awarded. One-half of this fee shall be the obligation of the respondents in addition to these benefits. The remaining one-half of this fee shall 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