

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F603317

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| JOHN THOMAS | CLAIMANT |
| SKEETS ELECTRIC COMPANY | RESPONDENT |
| FIRSTCOMP INSURANCE, INSURANCE CARRIER | RESPONDENT |

OPINION FILED MAY 4, 2007

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

Claimant represented by PHILIP WILSON, Attorney, Little Rock, Arkansas.

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

STATEMENT OF THE CASE

A hearing was held in the above styled claim on February 5, 2007, in Springdale, Arkansas. A pre-hearing order was entered in the case on December 11, 2006. The 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 amended the fifth stipulation to reflect that there is no dispute over the payment of temporary total disability benefits through June 28, 2006, to add the additional stipulation concerning the claimant's receipt of unemployment benefits, to add the additional stipulation that the claimant was terminated for cursing his boss on June 28, 2006, to amend the issue #2 to reflect that the claimant is only seeking additional temporary total disability benefits from June 29, 2006 through a date yet to be determined, and to add the additional issue of the effect of Ark. Code Ann. §11-9-526 on the claimant's

entitlement to additional temporary total disability benefits. A copy of the pre-hearing order with these amendments noted therein was made Commission's Exhibit No. 1 to the hearing.

The following stipulations were submitted by the parties and are hereby accepted:

1. On February 15, 2006, 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. On February 15, 2006, the claimant sustained a compensable injury to his head.
4. There is no dispute over the payment of medical expenses through October 23, 2006.
5. There is no dispute over the payment of temporary total disability benefits through June 28, 2006.
6. The claimant began to receive unemployment benefits in September of 2006 and continued to receive them through the date of hearing. The respondents are entitled to a credit for such payment against any temporary total disability benefits herein after awarded.
7. The claimant was fired for cursing his boss on June 28, 2006.

By agreement of the parties, the issues to be litigated and resolved at the present time were limited to the following:

1. The claimant's entitlement to additional medical services.
2. The claimant's entitlement to additional temporary total disability benefits from June 29, 2006 through a date yet to be determined.
3. Whether Ark. Code Ann. §11-9-526 precludes the claimant's entitlement to additional temporary total disability benefits.
4. Appropriate attorney's fee.

In regard to these issues, the claimant contends:

"The claimant contends that he sustained a serious head and elbow injury and after seeing a doctor chosen by the respondents he attempted to return to work. He was unable to work under the conditions and is no longer working. The insurance carrier sent the claimant to Dr. Rutherford who indicated the claimant was never in a position to be able to return to work. The claimant is entitled to temporary disability benefits from the date last paid to a date yet to be determined, continued medical care and treatment, and the appropriate attorney fees for controversion."

In regard to these issues, the respondents contend:

"It is the respondents position that all appropriate benefits have been paid and that the claimant's current problems are preexisting in nature."

DISCUSSION

I. ADDITIONAL MEDICAL SERVICES

_____The first issue to be addressed concerns the claimant's entitlement to additional medical services, after October 23, 2006. The burden rests upon the claimant to prove that these additional medical services represent "reasonably necessary medical services", under Ark. Code Ann. §11-9-508.

Medical services are reasonably necessary when they are connected with or necessitated by the compensable injury. Further, the medical services must be shown to have a reasonable likelihood of accomplishing their intended purpose or goal, at the time such services are rendered.

On October 23, 2006, the claimant was evaluated by Dr. Reginald Rutherford, a neurologist. This evaluation was conducted at the respondents' request, and Dr. Rutherford was selected by the respondents to perform this evaluation.

Following his review of the claimant's previous medical records and after personally examining the claimant, Dr. Rutherford opined that the claimant was suffering from a significant traumatic brain injury to the inferior frontal lobes bilaterally with the left lobe damage being more severe than the right. He also opined that the claimant was experiencing a significant traumatic brain injury to the left anterior inferior temporal lobe. He noted that this damage had resulted in the claimant experiencing seizures, cognitive impairment, depression, and loss of taste and smell. It was his further opinion that the claimant had not reached maximum medical improvement and would not likely do so until at least two years following the date of his injury. Dr. Rutherford recommended that the claimant undergo an ambulatory EEG, a neurocognitive rehabilitation program, a psychiatric evaluation to address his depression, and a continuation of his medication (particularly his anti-seizure medication).

Dr. Rutherford is a board certified neurologist with particular expertise in the area of medicine associated with the claimant's compensable injury and its effects. His recommendations concerning continued evaluation and treatment are identical with those previously recommended by the claimant's initial treating neurologist, Dr. Michael Morse. Dr. Morse is also a board certified neurologist with considerable expertise in medicine associated with the claimant's compensable injury. I would further note that the testing and treatment recommended by Dr. Rutherford and Dr. Morse is of a type and nature commonly used by the general medical community in the treatment of injuries such as those experienced by the claimant.

After consideration of all the evidence presented, it is my opinion that the claimant has proven by the greater weight of the evidence that the medical services recommended by Dr. Rutherford represent "reasonably necessary medical services" for his compensable injury, as that term is used by Ark. Code Ann. §11-9-508. Specifically, he has proven that these medical services were necessitated by or connected with this compensable injury and have a reasonable expectation of accomplishing their intended purposes or goals of accurately determining the nature and extent of his injury, treating the actual physical damage caused by his injury, or reducing the symptoms and debilitating effects of his compensable injury. Thus, under the provision of Ark. Code Ann. §11-9-508, the respondents would be liable for the expense of these

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

II. ADDITIONAL TEMPORARY TOTAL DISABILITY BENEFITS

The next issue to be addressed concerns the claimant's entitlement to additional temporary total disability benefits from June 29, 2006 through a date yet to be determined. The burden rests upon the claimant to prove that he was rendered temporarily totally disabled during this period.

In order to meet his burden, the claimant must first show that he has continued within his healing period from the effects of his compensable injuries, during this entire period. Secondly, he must show that he was also rendered totally disabled from performing regular gainful employment as a result of the effects of his compensable injury, throughout this entire period.

The duration of the healing period is a medical question, which must be resolved on the basis of the greater weight of the medical evidence presented. The healing period continues until the claimant has achieved the maximum benefit of time and medical treatment in the resolution or stabilization of the actual physical damage caused by the compensable injury. Once this underlying physical damage has resolved or at least stabilized, at a level where nothing further in the way of medical treatment or time offers a reasonable expectation of improvement, then the healing period has ended.

In the present case, none of the claimant's various physicians have indicated that the claimant has reached maximum medical

improvement from his most significant compensable injury, the compensable injury to his brain. In fact, the respondents' medical expert, Dr. Rutherford, has specifically expressed the opinion that the claimant will not reach maximum medical improvement and will likely continue in his healing period from the effects of his compensable brain injury for approximately two years following the date of its occurrence.

After consideration of all the evidence presented, I find that the claimant has established by the greater weight of the credible evidence that he has continued within his healing period from the effects of his compensable brain injury from June 29, 2006 to a date yet to be determined. Therefore, the claimant has proven the first necessary element for his entitlement to the additional temporary total disability benefits he now seeks.

The record shows that the claimant is now 35 years old. He has an 11th education with a GED. His only vocational training is in the electrical field, but apparently he is not a licensed electrician.

The testimony of the claimant and his wife reflect that since the claimant's compensable injury, he has had both cognitive and emotional difficulties. They also testified that since the compensable injury, his temper has worsened, he has had constant headaches, depression, crying, and mood swings. They also stated that the claimant's injured elbow has continued to swell and hurt. Finally, they described the onset and continuation of symptoms, following the compensable injury, in the form of heat intolerance

with excessive sweating and photophobia (i.e. increased sensitivity to light).

Mary Forrest, the secretary/receptionist/bookkeeper and payroll clerk for the respondent testified that following the claimant's compensable injury he exhibited a substantial change in his personality. She stated that after his compensable injury he became "very mouthy" and on the day of his termination appeared to be "out of control and ready to explode". She also described changes in the form of increased light sensitivity and heat sensitivity with excessive sweating.

The medical evidence records a description of the claimant's symptoms and difficulties that coincides with that given by the claimant and his wife in their testimony. It further objectively documents the presence of physical injury to the claimant's brain and the subsequent presence of substantial psychological and cognitive deficits. The medical record further indicates that the claimant's recorded symptoms and deficits are compatible with the objectively documented areas of damage to his brain following his compensable injury.

In his report of October 23, 2006, Dr. Reginald Rutherford (the respondents own expert) states:

"He (the claimant) is not at MMI at this juncture, he is not capable of resuming normal unrestricted physical activity, and he is not able to return to his former employment. His prior release clearly being premature. Mr. Thomas will also need to refrain from driving until he is seizure free for a one year interval in accordance with Arkansas State law."

After consideration of all the evidence presented, it is my opinion that the symptoms described by the claimant and his wife are accurate and are the result of the effects of his compensable injuries of February 15, 2006, particularly those to the claimant's brain. The claimant has proven by the greater weight of the credible evidence that his compensable injuries prevent him from driving, from working at heights, from working around machinery or moving equipment, and from working with or around electricity. He is also experiencing cognitive dysfunction, depression and emotional instability, as well as phobophobia, and heat intolerance. With these various restrictions and limitations, the claimant would simply have no reasonable expectation of obtaining employment on the open job market. Therefore, he has proven the second requirement necessary to establish temporary total disability during the period of June 29, 2006 through a date yet to be determined.

III. EFFECT OF ARK. CODE ANN. §11-9-526 ON THE CLAIMANT'S ENTITLEMENT TO ADDITIONAL TEMPORARY TOTAL DISABILITY BENEFITS

The final issue to be addressed is whether the claimant is precluded from receiving temporary total disability benefits by the provisions of Ark. Code Ann. §11-9-526. This subdivision of the Act bars a claimant from receiving any compensation during the period of time the claimant continues to unjustifiably refuse suitable employment that has been offered to or procured for him by the respondent.

The evidence presented in this case shows that the respondent created a light duty position for the claimant. In regard to this light duty position, the respondent also made various attempts to accommodate some of the claimant's physical restrictions and limitations. Not only was the actual work light, but the claimant was also allowed to work in the dark and furnished him with a fan. However, on June 28, 2006, the claimant became involved in an altercation with supervisory personnel and used profane and abusive language toward his supervisor. At that time, the respondent terminated the claimant or withdrew the offered light duty employment.

However, I am not convinced that the employment position that was provided the claimant was within all of his limitations and restrictions resulting from his compensable injuries. While this position may have been within his overall physical restrictions and limitations, I do not believe it was within his mental and emotional limitations.

In fact, of the evidence presented, there is no employment that would be "suitable" or meet all of the claimant's restrictions, both physical and mental or emotional.

As noted by the claimant, his wife, and Ms. Forrest, the claimant's emotional condition substantially changed following his compensable injury. He became more irritable, or "mouthy". It is my opinion that this change was due to the claimant's compensable injury and was beyond the claimant's control, at least at that point in his recovery. The dispute on June 28, 2006, appears to be

over a somewhat inconsequential matter. Yet, as Ms. Forrest describes, the claimant appeared to go out of control and ready to explode. I agree with Dr. Rutherford that the claimant was returned to work prematurely and before he was mentally and emotionally capable of working at any position. Therefore, even if Ark. Code Ann. §11-9-526 does apply to instances where a claimant is terminated, it is not applicable to the facts in the present claim. The respondent has simply failed to show that the employment offered to the claimant was "suitable to his capacity".

FINDINGS OF FACT & CONCLUSIONS OF LAW

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

2. On February 15, 2006, the relationship of employee-employer-carrier existed between the parties.

3. On February 15, 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 February 15, 2006, the claimant sustained a compensable injury to his head or brain.

5. There is no dispute over the payment of medical expenses incurred through October 23, 2006.

6. The medical services recommended by Dr. Michael Morse and Dr. Reginald Rutherford represent "reasonably necessary medical services" within the meaning of Ark. Code Ann. §11-9-508. Pursuant to the provision of this subsection, the respondents are liable for

the expense of these services (subject to the Commission's medical fee schedule).

7. There is no dispute over the payment of temporary total disability benefits through June 28, 2006.

8. The claimant was rendered temporarily totally disabled by his compensable head or brain injury for the period of June 29, 2006 through a date yet to be determined. The claimant has proven that during this time interval he continued within his healing period from the effects of his compensable injury and continued to be rendered totally disabled from all forms of regular gainful employment as the result of this injury.

9. The claimant is not barred from receiving temporary total disability benefits after June 28, 2006 by the provisions of Ark. Code Ann. §11-9-526. Specifically, the respondents have failed to prove that he was offered or provided employment that was suitable to his capacity or within his physical and mental or emotional limitations caused by the compensable injury.

10. The respondents are entitled to a set-off against the temporary total disability benefits herein awarded for any and all unemployment benefits received by the claimant from the Arkansas Employment Security Division, during the same period.

11. The respondents have controverted the claimant's entitlement to any medical services after October 23, 2006, and his entitlement to any temporary total disability benefits after June 28, 2006.

12. A reasonable fee for the claimant's attorney is the maximum statutory attorney's fee on the additional temporary total disability benefits herein awarded for the period of June 29, 2006 through a date yet to be determined.

ORDER

The respondents shall pay to the claimant temporary total disability benefits for the period beginning June 29, 2006 and continuing through a date yet to be determined. The respondents are entitled to a set-off or credit for unemployment benefits received by the claimant from the Arkansas Employment Security Division during this same period.

The respondents shall be liable for the expense of medical services provided and recommended to the claimant by and at the direction of Dr. Michael Morse and Dr. Reginald Rutherford for his compensable brain injury. 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 controverted temporary total disability benefits herein awarded for the period beginning June 29, 2006 and continuing through a date yet to be determined. In calculating these attorney's fees no consideration can be given to the set-off accorded the respondents for unemployment benefits received by the claimant during this same period. One-half of this attorney's fee is the obligation of the respondents in addition to these benefits. The remaining one-half of this attorney's 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