

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F605957

JORGE VERA	CLAIMANT
BUILT WELL CONSTRUCTION	RESPONDENT
CONTINENTAL CASUALTY, INSURANCE CARRIER	RESPONDENT

OPINION FILED MAY 29, 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 FRANK NEWELL, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above styled claim on March 5, 2007, in Springdale, Arkansas.

A pre-hearing order was entered in the case on January 9, 2007. 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, a clarification was made in regard to the fourth stipulation (concerning the payment of medical expenses) and the additional issue of the claimant's entitlement to additional medical services by Dr. Raben was raised). 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 January 24, 2006, the relationship of employee-employer-carrier existed between the parties.
2. The appropriate weekly compensation benefits are \$406.00 for total disability and \$305.00 for permanent partial disability.
3. On January 24, 2006, the claimant sustained a compensable injury to his back.
4. There is no dispute over the payment of medical expenses incurred through Dr. Raben's initial visit of December 26, 2006.
5. All appropriate temporary disability benefits were paid through July 11, 2006.
6. The respondents accepted liability for and commenced the payment of a permanent partial disability of 10% to the body as a whole on August 2, 2006.

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

1. The claimant's entitlement to additional temporary total disability benefits from July 12, 2006 through a date yet to be determined.
2. Appropriate attorney's fees.
3. The claimant's entitlement to continued medical services by Dr. Raben.

In regard to these issues, the claimant contends:

"Claimant was injured on January 24, 2006. His lower back was injured when he fell out of a window onto concrete."

In regard to these issues, the respondents contend:

- (a) Respondents have accepted this claim as compensable.
- (b) Claimant is not entitled to an award of temporary total disability benefits.
- (c) Claimant is not entitled to an award of additional medical benefits.

DISCUSSION

I. ADDITIONAL TEMPORARY TOTAL DISABILITY BENEFITS

The first issue to be addressed is the claimant's entitlement to additional temporary total disability benefits from July 12, 2006 through a date yet to be determined. The burden rests upon the claimant to prove his entitlement to these benefits. In order to meet this burden, the claimant must prove that, during this period, he has continued within his healing period from the effects of his compensable injury and has been rendered totally disabled from performing gainful employment as a result of this injury.

The issue of the duration of the healing period is a medical question, which must be resolved on the basis of the greater weight of the credible medical evidence presented. The healing period is the time necessary for the actual physical damage, caused by the compensable injury, to resolve or at least stabilize. Once this underlying physical damage has resolved or has stabilized at a point where nothing further in the way of time or medical treatment offers a reasonable expectation of improvement, then the healing period has ended. The mere continuation of chronic symptoms from a permanent injury is not sufficient, in and of itself, to extend the healing period.

In the present case, the claimant appears to have sustained various injuries in an employment related fall on January 24, 2006. His primary injuries involved his lumbar spine and resulted in a two level fusion (L4-5 and L5-S1). X-rays taken by Dr. James Blankenship, on May 11, 2006, were interpreted as showing a stable fusion developing. X-rays that were taken by Dr. Blankenship, on June 28, 2006, also showed a stable fusion at L4-S1 with residual degree of spondylolisthesis at L5. On June 29, 2006, Dr. Blankenship noted that the claimant's most recent x-rays looked good. At that time, he assigned a 10 percent permanent physical impairment and released the claimant to light duty, effective July 10, 2006.

The claimant apparently returned to light duty at the respondent on or about July 10, 2006, and worked through July 13, 2006. According to the claimant, his complaints worsened upon returning to work, and he ceased working on July 13, 2006.

Kevin Hickman, a co-employee of the claimant, testified that on July 14, 2006, he saw the claimant take several rolls of masking paper from the job site and put them into his car, then go back to work. He stated that he told the foreman, Jimmy Jarvis, about the claimant's actions. Jimmy Jarvis, the claimant's supervisor and the foreman for the respondent, testified that he recalled an incident, after the claimant had returned from his injury. It was his testimony that on the morning of the claimant's last day at work for the respondent, he had asked the claimant if the claimant had taken any masking paper. The claimant admitted to taking the paper and stated that his kids liked to draw on it. Mr. Jarvis and

the claimant then proceeded to the claimant's car, where the claimant took out the rolls of paper and returned them to Mr. Jarvis. Mr. Jarvis stated that he then advised Jim Martinez, the overall supervisor about the claimant's actions. Mr. Martinez requested that he advised the claimant to come by the office for a talk. Mr. Jarvis testified that when he informed the claimant that Mr. Martinez wanted to see him in the office, the claimant left and never returned to the job site.

The claimant denied that he took any paper or that he had any conversation with Mr. Jarvis on his last day of employment. It was his testimony that he only learned that he had been fired some days or weeks later when he was informed by the insurance adjustor that this was the reason his benefits had been stopped. However, the claimant gives no indication that he made any attempt after leaving work on July 13, 2006, to advise his employer that he would not be in due to increased back difficulties. Nor does the claimant indicate that he advised his employer that he was leaving work on July 13, 2006, due to his back difficulties. I find such action, or rather inactions, on the part of the claimant to be inconsistent with his supposed lack of knowledge that some incident had occurred which would subject him to disciplinary action and possibly termination.

The medical evidence shows that on July 13, 2006, the claimant apparently drove himself to the emergency room in Washington Regional Medical Center, complaining of increased back pain since returning to work. At that time, his physical examination was

noted to be essentially normal. However, he continued to request pain medication.

On July 19, 2006, the claimant again saw Dr. Blankenship. At Dr. Blankenship's request, x-rays were taken. These x-rays revealed the claimant's fusion hardware to be in place and in good position. Dr. Blankenship noted that there was a good formation of bridging bone at the fusion site and that the claimant had experienced a mere complete reduction of his previous spondylolisthesis. Dr. Blankenship noted no pathological motion of the fusion sites, no erosion or absorption of the implants, and no evidence of discitis or infection. At the time of this visit, an MRI of the claimant's lumbar spine was also performed. This MRI was interpreted by Dr. Blankenship as showing nothing unusual except for postoperative fluid build up in various areas. The MRI revealed no residual or recurrent stenosis or compression of any of the exiting nerve roots or the spinal cord.

The medical record shows that the following day, July 20, 2006, the claimant again drove himself to the emergency room of Washington Regional Medical Center, seeking pain medication. It would appear from Dr. Blankenship's subsequent reports that this visit was against Dr. Blankenship's express directives.

On July 25, 2006, a FCE was performed on the claimant. This extensive testing was interpreted as revealing submaximal effort on the part of the claimant. It was the examiner's opinion that the overall testing, when taken in combination with clinical observations suggested considerable question be drawn as to the

reliability or accuracy of the claimant's subjective reports of pain and limitation.

On August 1, 2006, Dr. Blankenship opined that the claimant had reached maximum medical improvement from his compensable injury. He also stated that in his opinion the claimant needed no further medical treatment, either in the form of medicine, physical therapy, or surgery. He concluded that the claimant's condition was stable and that the only potential beneficial services required was the claimant's performance of home exercises.

The claimant subsequently obtained a change of physicians through this Commission from Dr. Blankenship to Dr. Cyril Raben. Dr. Raben appears to have initially evaluated the claimant on December 26, 2006. In his physical examination, Dr. Raben notes that the claimant exhibited normal gait and station. He also observed that there was no misalignment, asymmetry, crepitation, defects, tenderness, masses, effusions, decreased range of motion, instability, atrophy, or abnormal strength or tone in the head, neck, spine, ribs, pelvis, or upper and lower extremities. However, in this same report he indicates that the claimant exhibited a forward flex posture canted to the left and a mild right sided limp. He also records reduction range of motion, pain and tenderness on palpitation in the spine, ribs, and pelvis. Neurological examination was noted as normal. No real objective abnormalities were noted.

None the less, Dr. Raben opined that the claimant was experiencing lumbar spine disc degeneration, lumbar spine disc

herniation, chronic pain, post laminectomy syndrome, and complications based upon a non union of his fusion. It is difficult to discern upon what basis Dr. Raben concluded that the claimant was still suffering from a lumbar disc herniation and from a non union of his prior fusion. All previous testing clearly failed to show either of these conditions. Further, Dr. Raben's own physical examination would not be normally considered as supporting the diagnosis of lumbar disc herniation and non union of the fusion, even if subjective findings were considered. At the time of this examination, Dr. Raben performed a gluteal musculature injection and recommended a CT myelogram of the lumbar spine, and a total body scan. The total body scan was subsequently performed and appeared to be essentially normal.

The claimant returned to Dr. Raben on February 5, 2007. No clinical note from this visit has been introduced. However, the claimant apparently obtained from Dr. Raben a notation indicating that he was under Dr. Raben's care and was unable to work at that time "due to his condition". This note further stated that the claimant would need further testing to evaluate his "limitations" and was to remain off work until the testing was completed.

After consideration of all the medical evidence presented, it is my opinion that the greater weight of the credible medical evidence fails to prove that the claimant continued within his healing period from the effects of his compensable lumbar injury after July 12, 2006. The reports and records of Dr. Blankenship show that the physical damage caused by the claimant's compensable

injury and resulting surgery had stabilized by that date. I find Dr. Blankenship's opinion to be credible and convincing. Not only is Dr. Blankenship a competent neurosurgeon with particular expertise in the area of medicine associated with the claimant's compensable injury, he was also the claimant's primary treating physician. Further, his opinion is supported by the numerous tests and evaluations performed on the claimant. It is important to note that while Dr. Raben recommended further extensive testing of the claimant, he does not expressly recommend any further medical treatment that would be intended to improve or resolve the physical damage caused by the compensable injury. While further medical treatment might be appropriate for Dr. Raben's diagnosis of a continuing herniated disc and a failed fusion, the evidence presented simply fails to support these two diagnoses. Clearly, the claimant has experienced a permanent injury and will likely suffer from chronic symptoms for the remainder of his life. However, the greater weight of the medical evidence presented fails to show any further active medical treatment that would have a reasonable expectation of improving the underlying physical damage causing these chronic symptoms.

As the claimant has failed to prove that he continued within his healing period from the effects of his compensable lumbar injury on and after July 12, 2006, he cannot be awarded the additional temporary total disability benefits he now seeks. His claim for such benefits must be denied.

II. ADDITIONAL MEDICAL SERVICES

The next issue is the claimant's entitlement to additional medical services by and at the direction of Dr. Raben, after the initial visit of December 26, 2006. The burden rests upon the claimant to prove that such medical services represent "reasonably necessary" medical services, under Ark. Code Ann. §11-9-508. The term "reasonably necessary" medical service is not limited only to those medical services directed toward the actual treatment of the physical damage caused by the compensable injury, but extends to all medical services that are necessitated by or connected with the compensable injury and have a reasonable expectation of accomplishing the purpose or goal for which they are intended. Thus, this term would also extend to medical services reasonably necessary to accurately ascertain the nature and extent of the compensable injury or even to provide symptomatic relief of chronic symptoms.

The bone scan recommended by Dr. Raben has apparently been performed. This scan appears to have been interpreted as essentially normal. The remaining diagnostic testing recommended by Dr. Raben is in the form of a myelogram with an accompanying enhanced CT scan. Clearly, such testing is recognized as the "gold" standard in determining the presence of a herniated disc or other neurological impingement. However, the only basis for diagnosing continued neurological impingement is the claimant's subjective complaints. All of the prior objective testing performed on the claimant has failed to show any continuing neurological

impingement. All of the clinical examinations performed on the claimant have also failed to show any objective evidence of continuing neurological impingement. The record in this case casts significant doubt on the credibility of the claimant in regard to his subjective complaints. It would appear that other less invasive and less extensive testing, in the form of x-rays and a possible MRI study would be sufficient to accurately ascertain if the claimant has experienced a failure of his surgical fusion or his experiencing a neurological impingement or compression from the compensable injury.

After consideration of all the evidence presented, it is my opinion that the bone scan recommended by Dr. Raben was reasonably appropriate to accurately ascertain the nature and extent of the claimant's complaints. Thus, it represents a reasonably necessary medical service, under Ark. Code Ann. §11-9-508. I further find that periodic follow up examinations and evaluations by Dr. Raben would be reasonably appropriate for the claimant's chronic complaints, resulting from his compensable injury. Thus, these periodic follow up evaluations would also represent reasonably necessary medical services, under Ark. Code Ann. §11-9-508. However, I find that the evidence presented has failed to prove that the myelogram with enhanced CT scan recommended by Dr. Raben is reasonably necessary to accurately diagnose the nature and extent of the claimant's compensable injury or continuing complaints. Therefore, the claimant has failed to prove that this recommended testing represent reasonably necessary medical

services, under Ark. Code Ann. §11-9-508. The respondents shall be liable for the expense of the bone scan recommended by Dr. Raben and for a reasonable number of subsequent follow up visits by Dr. Raben but shall not be liable for the myelogram with enhanced CT scan recommended by Dr. Raben. The respondents' liability in regard to these expenses is controlled by the medical fee schedule established by this Commission.

FINDINGS OF FACT & CONCLUSIONS OF LAW

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

2. On January 24, 2006, the relationship of employee-employer existed between the parties.

3. On January 24, 2006, the claimant earned wages sufficient to entitle him to weekly compensation benefits of \$406.00 for total disability and \$305.00 for permanent partial disability.

4. On January 24, 2006, the claimant sustained a compensable injury to his lumbar spine.

5. There is no dispute over the payment of medical expenses incurred through Dr. Raben's initial visit of December 26, 2006.

6. The claimant has proven by the greater weight of the credible evidence that the bone scan recommended by Dr. Raben and subsequent follow up evaluations or examinations by Dr. Raben also represent reasonably necessary medical services, under Ark. Code Ann. §11-9-508. The respondents are liable for the expense of these services, subject to the Commission's medical fee schedule.

7. The claimant has failed to prove that the myelogram with enhanced CT scan, which has been recommended by Dr. Raben, represent reasonably necessary medical services for his compensable injury under Ark. Code Ann. §11-9-508. The respondents are not liable for the expense of this service.

8. All appropriate temporary total disability benefits have been paid through July 11, 2006. The claimant has failed to prove that he continued to be temporarily totally disabled as a result of the effects of his compensable injury for the period beginning July 12, 2006, and continuing through a date yet to be determined. Specifically, the claimant has failed to prove by the greater weight of the credible medical evidence that he has continued within his healing period from the effects of his compensable injury, after July 10, 2006.

9. The respondents have controverted the claimant's entitlement to any temporary total disability benefits after July 12, 2006, and his entitlement to any additional medical services by Dr. Raben after the initial visit of December 26, 2006.

10. As no controverted benefits have herein been awarded directly to the claimant, no controverted attorney's fee can be awarded to his attorney.

ORDER

The respondents shall be liable for the expense of the bone scan, performed at the request to Dr. Raben, and for a reasonable period of follow up evaluations or examinations by Dr. Raben, after

December 26, 2006. This liability is subject to the Commission's medical fee schedule.

For the reasons heretofore set out in this Opinion, the claim for the payment of the expense of the recommended myelogram with an accompanying enhanced CT scan is denied and dismissed.

For the reasons heretofore set out in this Opinion, the claim for additional temporary total disability benefits from July 12, 2006 through a date yet to be determined is denied and dismissed.

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