

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F511949

NICHOLAS WEBBER	CLAIMANT
DIEBOLD, INC.	RESPONDENT
ZURICH AMERICAN, INSURANCE CARRIER	RESPONDENT
CRAWFORD & COMPANY, TPA	RESPONDENT

OPINION FILED APRIL 19, 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 CAROL WORLEY, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held on January 23, 2007, in Fort Smith, Arkansas. A pre-hearing order was entered in this case on January 31, 2006. At the time of the hearing, certain changes were made in regard to the relevant employment dates, the carrier was identified in the heading, and clerical or stylist changes were made in regard to the stipulations and issues. 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 all relevant dates, including October 14, 2005, the relationship of employee-employer-carrier-third party administrator existed between the parties.

2. The appropriate weekly compensation benefits are \$466.00 for total disability and \$350.00 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 as the result of cumulative stress or trauma during his employment with the respondent.
2. The claimant's entitlement to the payment of medical expenses, temporary total disability benefits from October 20, 2005 through at least February 20, 2006, and attorney's fees.
3. The effect of continued salary and group short and long term disability benefits.

In regard to these issues, the claimant contends that his condition is due to his job duties and not to a specific identifiable incident on October 20, 2005. The October 20, 2005 date is when the claimant first saw the doctor regarding his back injury; however, it is not the date when the injury actually occurred. The claimant will contend that he became seriously symptomatic on Friday, October 14 and that he notified the respondent's on October 18, 2005 that he was going to the doctor and then on October 28, 2005, he notified the respondent's that his injury at work had not got better.

In regard to these issues, the respondents deny the claimant sustained a compensable injury to his back.

DISCUSSION

_____The central issue in this case is whether the claimant sustained a “compensable injury” to his low back or lumbar spine, as that term is defined by Ark. Code Ann. §11-9-102(4)(A)(ii). The burden rests upon the claimant to prove all of the necessary elements or requirements to establish this alleged compensable injury.

First, he must satisfy the statutory requirements of Ark. Code Ann. §11-9-102(4)(D). Under this subsection, the claimant must “establish”, by medical evidence, the actual existence of a physical injury or condition involving his low back or lumbar spine. Further, he must show 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 evidence presented in this claim amply “establishes” the actual existence of a physical injury or condition, involving the claimant’s low back or lumbar spine. The medical evidence shows this physical injury or condition to be in the form of chronic disc disease or dessication at the L4-5 and L5-S1 levels, disc bulging and possible small central disc protrusion at L4-5, a right paracentral disc herniation at L5-S1 with nerve root impingement, and spinal canal stenosis at L4-5 and L5-S1. Further, the medical evidence shows that the actual existence of these physical injuries or conditions is clearly supported by

“objective findings”, in the form of an MRI study, a post myelogram CT study, and visual observations during the subsequent corrective surgery. 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).

Next, the claimant must satisfy the definitional requirements for a “compensable injury” that are found in Ark. Code Ann. §11-9-102(4)(A)(ii)(b). The definitional requirements of this subsection are:

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

Ark. Code Ann. §11-9-102(4)(E)(ii) further requires that the alleged compensable injury must be the “major cause” of the claimant’s disability or need for treatment. Ark. Code Ann. §11-9-102(14)(A) defines “major cause” as more than 50 percent of the cause. However, the claimant need only prove that the alleged compensable injury is the “major cause” of his resulting disability or need for treatment, but need not prove that the alleged compensable injury was the “major cause” of the ultimate medical condition, itself.

In order to prove that these medically established and objectively documented physical injuries or conditions involving his lumbar spine “arose out of and occurred in the course of” his employment with the respondent, the claimant must prove the

existence of a causal relationship between these medically established and objectively documented injuries or defects and his employment activities for the respondent. However, he need not show that his employment activities for the respondent were the sole or even "major cause" of the actual physical injuries or defects, themselves.

The medical evidence unquestionably shows the presence of longstanding degenerative changes involving the L4-5 and L5-S1 intervertebral discs and adjacent structures. However, an actual disc herniation, such as that noted at L4-5, is not normally considered to be purely a degenerative defect. Although degeneration of a disc can make that disc more susceptible to an actual herniation, it is generally accepted that the actual herniation of the disc will not occur until the disc is subjected to direct stress or trauma (albeit, relatively minor in degree, such as merely twisting or bending).

The claimant testified that, on October 14, 2005, he initially experienced pain and symptoms in his back and legs. These symptoms are indicative of the occurrence of the actual disc herniation. The claimant's testimony, in this regard, appears credible. There is no evidence that the claimant experienced any difficulties with his back or radicular symptoms with his lower extremities (particularly, his right lower extremity) prior to October 14, 2005. There is also no evidence of any prior injuries or treatment involving the claimant's lower back.

The claimant further testified that at the time of the onset of his lower back and radicular symptoms, he was merely performing his regularly assigned job duties that required him to climb in and out of his truck, to lift relatively heavy weights, to bend at the waist, and to stoop. Again, I find the claimant's testimony concerning the close temporal relationship between the onset of his lower back and radicular symptoms with these specific employment activities to be credible. Such testimony coincides with the histories noted by the claimant's various physicians and with his initial report of injury.

Clearly, the employment activities described by the claimant could reasonably have produced sufficient stress and trauma on the claimant's already weakened L5-S1 intervertebral disc to have caused the actual herniation of the disc. This fact is clearly noted by Dr. Arthur Johnson, in his report of January 4, 2007. In this report, Dr. Johnson states:

"The patient's occupation, however, could definitely contribute to the cause of his ruptured disc with repeated getting in and out of the truck seat requiring awkward positioning and stretching of the lower extremity and lifting up and also getting down out of the high seat as well with subsequent repeated impact of getting down from the high level. This repetitive activity has most likely, to a reasonable degree of medical certainty, contributed to his lumbar disc herniation and lumbar disc disease requiring surgical intervention."

Again, it must be noted that there is no evidence of any other stressful or traumatic event that occurred with a reasonable close temporal relationship to the initial onset of the claimant's lower back and radicular symptoms.

Following the longstanding rule announced in Hall v. Pittman Construction Company, 235 Ark. 104, 357 S.W. 2nd 263(1962), I find that the claimant has proven by the greater weight of the credible evidence, the existence of a causal relationship between his employment activities for the respondent, on and about October 14, 2005, and his subsequently medically established and objectively documented L5-S1 disc herniation with resulting nerve root impingement. This causal relationship is sufficient to support a finding that this disc herniation “arose out of and occurred in the course of” the claimant’s employment, as required by Ark. Code Ann. §11-9-102(4)(A)(ii)(b).

The medical evidence showing the actual herniation of the claimant’s lumbar disc and resulting impingement of the adjacent nerve roots is sufficient to prove that the claimant experienced “internal damage” to this part of his body. Thus, the claimant has satisfied the second requirement of Ark. Code Ann. §11-9-102(4)(A)(ii)(b).

The medical evidence also shows that the employment related injury, involved in this case was to the claimant’s “back”. Thus, the claimant has satisfied the third and final requirement of Ark. Code Ann. §11-9-102(4)(A)(ii).

Finally, the evidence presented shows that the sole and therefore “major cause” of the claimant’s need for medical treatment (including the surgical intervention) and the claimant’s resulting temporary total disability was the actual herniation of the L5-S1 intervertebral disc and the resulting nerve root

impingement. No treatment would have been required and no temporary disability would have resulted merely from the claimant's degenerative changes, even those resulting in some degree of spinal canal stenosis. Therefore, the claimant has proven by the greater weight of the credible evidence that his alleged compensable injury was the "major cause" of his need for medical services and resulting temporary total disability. Thus, he has satisfied the statutory requirement of Ark. Code Ann. §11-9-102(4)(E)(ii).

Next, it becomes necessary to determine the nature and extent of benefits to which the claimant is entitled. At this time, he is seeking the payment of medical expenses and temporary total disability benefits from October 20, 2005 through at least February 20, 2006. In order to be entitled to medical services, at the respondents' expense, the claimant must prove that such medical services were "reasonably necessary" for his compensable injury. Medical services are "reasonably necessary" when they 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 at the time they are rendered.

In the present case, the evidence shows that the medical services provided the claimant for his low back and radicular difficulties by and at the direction of personnel at the Cornerstone Family Clinic and by and at the direction of Dr. Arthur Johnson were necessitated by or connected with the claimant's compensable lumbar disc herniation and resulting nerve root impingement. The evidence further shows that these services were

of a type and nature commonly recognized by the general medical community as being appropriate and reasonable to accurately diagnose the nature and extent of injuries such as that experienced by the claimant, to correct the actual physical damage caused by injuries, such as that experienced by the claimant, and to provide symptomatic relief for injuries, such as that experienced by the claimant.

Therefore, I find that the medical services rendered to the claimant by and at the direction of personnel at the Cornerstone Family Medical Clinic and by and at the direction of Dr. Arthur Johnson for the claimant's lumbar spine and radicular difficulties represent "reasonably necessary medical services", under Ark. Code Ann. §11-9-508. Pursuant to the provisions of this subsection, the respondents would be liable for the expense of these services (subject to the medical fee schedule established by this Commission).

In order to be entitled to the temporary total disability benefits he now seeks, the claimant must prove two factors. First, he must prove that he continued within his healing period from the effects of his compensable lumbar injury. Second, he must prove that he continued to be rendered totally disabled from regular gainful employment as a result of the effects of this compensable lumbar injury.

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 regard to the resolution or stabilization of the actual physical damage produced by the compensable injury. Once this underlying physical damage has resolved or at least stabilized, at a level where nothing 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 has continued under active medical treatment for his compensable lumbar injury from October 20, 2005, through at least June 5, 2006. Thus, the claimant has satisfied the first requirement for his entitlement to the temporary total disability benefits he now seeks.

The claimant testified that he was physically unable to perform his prior employment activities or any other employment activities for which he would be qualified since October 20, 2005. The medical evidence shows that the claimant was medically restricted from performing any employment activities, as a result of the effects of his compensable lumbar injury through at least April 11, 2006 (although the claimant had been released to return to limited or light duty employment, on April 11, 2006, a surgical fusion was performed on April 26, 2006, which would have clearly again medically restricted him from engaging in any type of employment).

After consideration of all the evidence presented, I find that the claimant has proven by the greater weight of the credible

evidence that he was prevented from performing any form of regular gainful employment by his compensable lumbar injury for the period beginning October 20, 2005, and continuing through at least February 20, 2006.

The final issue to be addressed concerns the respondents' entitlement to an off-set or credit for group disability benefits, as provided by Ark. Code Ann. §11-9-411. The record implies that a portion of the medical services provided the claimant for his lumbar difficulties were paid under a group policy of medical insurance. The evidence further shows that the claimant received his full salary from the respondents from October 20, 2005 through March 30, 2006. Beginning March 31, 2006 and continuing for several months, the claimant drew short-term group disability benefits that were equivalent to 60 percent of his full salary. Thereafter, the claimant has drawn long-term group disability benefits of \$1,500.00 a month through the present.

Clearly, the respondents would be entitled to the set-off or reduction of benefits that is provided by Ark. Code Ann. §11-9-411 on all these group disability benefits. However, the respondents are also required to place into a reserve an amount equal to this set-off or reduction in benefits. Should releases not be obtained from the group insurance carriers or providers within five (5) years, then these reserved amounts are payable to the Death & Permanent Total Disability Trust Fund. _____

FINDINGS OF FACT & CONCLUSIONS OF LAW

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

2. On all relevant dates, including October 14, 2005, the relationship of employee-employer carrier-third party administrator existed between the parties.

3. On appropriate dates, the claimant earned wages sufficient to entitle him to weekly compensation benefits of \$466.00 for total disability and \$350.00 for permanent partial disability.

4. On or about October 14, 2005, the claimant sustained a compensable injury to his lumbar spine, in the form of a herniated disc at L5-S1 with resulting nerve root impingement. Specifically, the claimant has established the actual existence of this physical injury by medical evidence, which is supported by objective findings. He has further proven by the greater weight of the credible evidence that this particular injury arose out of and occurred in the course of his employment, caused internal physical harm to his body, and involved his "back". He has also proven that this compensable injury was the major cause of his need for medical treatment and the major cause of his temporary total disability.

5. The medical services provided to the claimant for his compensable lumbar injury by and at the direction of personnel at the Cornerstone Family Medical Clinic and by and at the direction of Dr. Arthur Johnson represent reasonably necessary medical services, under Ark. Code Ann. §11-9-508. Subject to the provisions of this subsection, the expense of these services is the

liability of the respondents herein, subject to the Commission's medical fee schedule.

6. The claimant has been rendered temporarily totally disabled as a result of his compensable lumbar injury for the period beginning October 20, 2005, and continuing through at least February 20, 2006. Specifically, the claimant has proven by the greater weight of the credible evidence that during this period, he continued within his healing period from the effects of his compensable injury and was rendered totally disabled as a result of this injury.

7. The claimant has received group disability benefits that would coincide with the workers' compensation benefits herein awarded. Pursuant to Ark. Code Ann. §11-9-411, the respondents would be entitled to an off-set or reduction for such benefits, but must place in reserve an amount equal to this off-set or reduction.

8. The respondents have denied the occurrence of any compensable injury to the claimant's back or lumbar spine and have controverted this claim in its entirety.

9. A reasonable fee for the claimant's attorney would be the maximum statutory attorney's fee on all 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 October 20, 2005, and continuing through at least February 20, 2006, subject to the reduction authorized by Ark. Code Ann. §11-9-411(a).

The respondents shall be liable for the expense of medical services provided the claimant for his compensable lumbar injury by and at the direction of the personnel at the Cornerstone Family Medical Clinic and Dr. Arthur Johnson. This liability is limited to the Commission's medical fee schedule. The respondents are also entitled to the reduction provided by Ark. Code Ann. §11-9-411(a).

The respondents shall pay to the claimant's attorney the maximum attorney's fee on all benefits herein and hereinafter awarded directly to the claimant, without consideration of the reduction provided by Ark. Code Ann. §11-9-411(a). One-half of this fee is the liability of the respondents in addition to these benefits. The remaining one-half of this fee shall be withheld by the respondents from any benefits payable to the claimant.

The respondents shall place in reserve, as required by Ark. Code Ann. §11-9-411(c) an amount equal to the reduction of benefits authorized by §11-9-411(a).

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