

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F705690

VIRGILIO OCHOA

CLAIMANT

TYSON FOODS, INC.
SELF INSURED

RESPONDENT

OPINION FILED JANUARY 3, 2008

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

Claimant represented by RONALD MCCANN, Attorney, Fayetteville, Arkansas.

Respondent represented by MELISSA LEE, Attorney, Springdale, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above styled claim on October 29, 2007, in Springdale, Arkansas. The deposition of the claimant was taken on August 28, 2007, and was admitted as Respondent's Exhibit No. 3. 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. Immediately prior to the commencement of the hearing, the claimant announced that the issue of his entitlement to temporary total disability was limited to the period of May 4, 2007 through June 27, 2007. A copy of the pre-hearing order, with this amendment 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 May 3, 2007, the relationship of employee-self insured employer-TPA existed between the parties.

2. The appropriate weekly compensation rates are \$504.00 for total disability and \$378.00 for permanent partial disability.
3. On May 3, 2007, the claimant sustained a compensable injury to his low back.
4. There is no dispute over the payment of medical expenses. 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 temporary total disability benefits between May 4, 2007 and June 27, 2007.
 2. Appropriate attorney's fees.

In regard to these issues, the claimant contends:

"The claimant contends that he sustained an on the job injury while in the course and scope of his employment with respondents on May 3, 2007. He further contends that he has been unable to return to work due to the residuals of his work related injury and is owed temporary total disability benefits from the date of injury to a date yet to be determined, as well as a controverted attorney's fee."

In regard to these issues, the respondent contends:

"a. The respondent contends that it has accepted the low back claim as compensable and that all appropriate medical benefits have been paid to date.

b. The respondent contends that the claimant is not entitled to temporary total disability payments as no treating physician has taken him off work and light duty work was available at the respondent's location during all periods of light duty.

c. The respondent contends that the claimant was released by his authorized treating physician, Dr. Cathleen Vandergriff, to

regular work with no restrictions on June 29, 2007.”

DISCUSSION

The sole issue presented for resolution, at the present time, is the claimant's entitlement to temporary total disability benefits for the period of May 4, 2007 through June 27, 2007. The burden rests upon the claimant to prove his entitlement to these benefits.

In order to meet his burden, the claimant must establish two facts by the greater weight of the credible evidence. First, he must show that he continued within his healing period from the effects of his compensable injury during the time in question. Secondly, he must show that he was also rendered totally disabled from performing regular gainful employment by the compensable injury, during this same interval.

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 has been defined as that period of time necessary for healing 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 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 was initially seen at the emergency room of Washington

Regional Medical Center on May 4, 2007. On that date, the claimant was noted to have complaints of pain in his lower back, which were supported by the observation of bilateral muscle spasms in this area. The claimant was treated with a morphine injection and oral medication, in the form of pain killers and muscle relaxants. He was discharged "home" and advised to seek follow up from an appropriate physician. No comment was made concerning his physical ability to work.

On May 7, 2007, the claimant was sent by the respondent to Cathleen Vandergriff, the company physician. Dr. Vandergriff continued the claimant's oral medications and added a regiment of physical therapy. This physical therapy was to be provided three times per week for at least two weeks.

On May 24, 2007, an MRI was performed on the claimant's lumbar spine, at the request of Dr. Vandergriff. This test revealed the presence of the straightening of the lumbar lordosis or curvature of the claimant's lumbar spine. This finding would be indicative of the continued presence of muscle spasms in this area. It further showed a small left sided paramedian disc protrusion with an annular tear of the L2-3 intervertebral disc, which resulted in some mild stenosis or narrowing of the spinal canal. The test further revealed the presence of mild annular bulging of the L4-5 and L5-S1 discs.

The claimant was subsequently seen, at the request of Dr. Vandergriff, by Dr. Luke Knox, a neurosurgeon. When the claimant was seen by Dr. Knox on June 19, 2007, Dr. Knox noted the presence

of significant paraspinal muscle spasms in the lumbar area. However, he found no evidence of any defect that would justify the need for surgical intervention. He returned the claimant to Dr. Vandergriff for continued conservative care. Finally, Dr. Knox advised the claimant that his difficulties would improve with time.

On June 29, 2007, the claimant was again seen by Dr. Vandergriff. Her physical examination, on that date, failed to note any continuing objective abnormalities, involving the claimant's lumbar spine. She specifically noted the absence of the previously observed muscle spasms. She opined that the claimant's continuing difficulties with his lower extremities were unrelated to his compensable lumbar injury and referred the claimant to his family physician for follow up care of the lower extremity complaints. Finally, she opined that the difficulties attributable to the claimant's compensable lumbar injury required no further medical treatment, and she released the claimant from her care.

After consideration of the foregoing medical evidence, it is my opinion that the greater weight of this evidence clearly establishes that the claimant continued within his healing period from the effects of his admittedly compensable lumbar injury for the period of May 4, 2007 through June 27, 2007. This would satisfy the first requirement for the claimant's entitlement to the temporary total disability benefits he now seeks.

There remains the question of actual total disability. Unlike the issue of the healing period, this issue is not solely a medical question. Thus, a determination of the existence of actual total

disability is not based solely on the medical evidence. However, this does not mean that the medical evidence is not relevant to this issue and cannot be considered in reaching a decision on this matter.

The medical record shows that, on May 4, 2007, the claimant was given an injection of morphine and a prescription for narcotic pain medication and muscle relaxers. Following this, he was "discharged home". No comment was made about the claimant's ability to perform gainful employment. However, the fact that the claimant was given a morphine injection would strongly imply that he was unable to work, at least on that date, due to his compensable injury.

When the claimant was initially seen by Dr. Vandergriff, on May 7, 2007, she released the claimant to return to work at limited or light duty. The only restrictions she imposed were no lifting in excess of 10 pounds and no above ground work. She also indicated that it was her opinion that the claimant was exaggerating his symptoms. However, she continued the claimant on oral narcotic pain medication and directed him to go to physical therapy three times per week. Clearly, both the pain medication and physical therapy would offer some impediment to the claimant's ability to perform regular gainful employment.

On June 1, 2007, Dr. Vandergriff appears to have released the claimant to return to employment with no restrictions. However, the same day, Dr. Vandergriff referred the claimant for a neurosurgical evaluation. The day before this release the claimant had undergone

an MRI study that revealed the presence of abnormalities indicative of continued lumbar muscle spasms and the presence of a disc protrusion with an accompanying annular tear. Clearly, these objective findings would logically dictate the need for continued restrictions upon the claimant's potential employment activities.

The June 19, 2007 medical report of Dr. Knox showed objective evidence of continued muscle spasms (classified by Dr. Knox as being "significant"). Again, these objective physical defects would logically imply the need for continued restrictions and limitations upon the claimant's employment activities.

The claimant testified that he was aware Dr. Vandergriff had released him to light duty. He also acknowledged that the respondent had offered him an employment position that was within Dr. Vandergriff's written restrictions. However, he did not believe that he was physically capable of performing even this limited or light duty employment at that time. He stated that on May 7, 2007, and for several weeks thereafter, he could hardly walk, could not go up and down the stairs, and even needed assistance getting on and off the toilet. It was also his testimony that he subsequently attempted to perform the proffered limited or light duty position, during the week of May 20, 2007 through May 26, 2007, and actually worked for 36.4 hours. This position consisted of sitting in a chair filing papers. However, he stated that even this light duty position increased his back pain and other symptoms. He ceased performing this limited or light duty position after only working 36.4 hours. It was his testimony that he did not return to

employment with the respondent, until June 28, 2007. At that time, he resumed his preinjury position and has continued in this position ever since. However, he testified that he still had to have assistance from co-employees in performing heavy lifting that is required by this position.

After consideration of all the evidence presented, it is my opinion that the claimant has proven by the greater weight of the credible evidence that he was totally disabled from performing all regular gainful employment for the period of May 4, 2007 through May 13, 2007, and from May 27, 2007 through June 27, 2007. I recognize that the claimant was not medically restricted from engaging in any and all types of employment during this period. However, the lack of such a restriction is not controlling. It is the job of this Commission, not some medical expert, to determine the presence of total disability. It is well established that an injured employee is not required to work in significant pain. The claimant testified that during the foregoing periods he was experiencing extreme pain in his back, as a result of his compensable injury. Although Dr. Vandergriff expressed the opinion that the claimant may have been exaggerating his symptoms, the repeated observations of significant lumbar muscle spasms would indicate that at least, a significant degree of his subjective pain complaints were valid. Substantial pain and limitations would also be a reasonably expected consequence of the objectively demonstrated annular tear. Finally, I would note, that despite her reservations concerning the magnitude of the claimant's subjective

complaints, Dr. Vandergriff continued to prescribe narcotic pain medication during her course of treatment of the claimant.

Based upon the nature and magnitude of the claimant's injury, as shown by objective testing, I am convinced that the claimant's actual physical limitations were substantially more than the restrictions imposed by Dr. Vandergriff (i.e. no lifting over 10 pounds and no above ground work). By the very nature of the claimant's injury, he would be reasonably expected to not only have difficulties lifting and climbing, but also bending or twisting at the waist and prolonged sitting, standing, or walking. In addition, the claimant's constant significant pain and the use of narcotic pain medication would substantially interfere with his ability to concentrate or focus on specific tasks. His participation in regularly scheduled therapy, three times a week, would also interfere with his ability to work a regular shifts.

However, the fact that the claimant actually worked for 36.4 hours during the week of May 20, 2007 through May 26, 2007, would prevent him from being entitled to temporary total disability benefits for this week. Clearly, temporary total disability benefits cannot be awarded during any period when the claimant actually worked and was compensated for his services.

I would also note that the record reveals that the claimant received full wages for 4 days of his scheduled 5 days during the week of May 13, 2007 through May 19, 2007, even though he did not actually work. Although the claimant may have been actually totally disabled during this time, Ark. Code Ann. §11-9-807(b)

would prevent the claimant from receiving an award of temporary total disability benefits during this period.

In summary, I find that the claimant is entitled to temporary total disability benefits from May 4, 2007 through May 13, 2007, and from May 27, 2007 through June 27, 2007. The respondent would be liable to the claimant for temporary total disability benefits during these periods at the appropriate weekly compensation rates.

FINDINGS OF FACT & CONCLUSIONS OF LAW

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

2. On May 3, 2007, the relationship of employee-self insured employer-third party administrator existed between the parties.

3. On May 3, 2007, the claimant earned wages sufficient to entitle him to weekly compensation benefits of \$504.00 for total disability and \$378.00 for permanent partial disability.

4. On May 3, 2007, the claimant sustained a compensable injury to his low back.

5. There is no dispute, at the present time, over the payment of medical expenses.

6. The claimant is entitled to temporary total disability benefits for the periods of May 4, 2007 through May 13, 2007, and May 27, 2007 through June 27, 2007. Specifically, the greater weight of the credible evidence establishes that, during these periods, the claimant continued within his healing period from the effects of his compensable injury, was rendered totally disabled from performing regular gainful employment by this injury, and did

not receive full wages. (I would note that the claimant might be entitled to temporary partial disability benefits during the week of May 20, 2007 through May 26, 2006. However, this was not specifically designated as an issue for litigation and resolution at the present time).

7. The respondent has controverted the claimant's entitlement to any temporary total disability benefits.

8. The appropriate attorney's fee for the claimant's attorney is the maximum statutory attorney's fee on the temporary total disability benefits herein awarded.

ORDER

The respondent shall pay to the claimant temporary total disability benefits for the periods of May 4, 2007 through May 13, 2007 and from May 27, 2007 through June 27, 2007.

The respondent remains liable for any reasonably necessary medical services required by the claimant for his admittedly compensable back injury.

The respondent shall pay to the claimant's attorney the maximum statutory attorney's fee on the controverted temporary total disability benefits herein awarded. One-half of this fee is the obligation of the respondent in addition to these benefits. The remaining one-half of this attorney's fee is to be withheld by the respondent 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