

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. G806247

JON ROGERS, Employee	CLAIMANT
ARAMARK, Employer	RESPONDENT
SEDGWICK CLAIMS MANAGEMENT, Carrier	RESPONDENT

OPINION FILED JUNE 16, 2021

Hearing before ADMINISTRATIVE LAW JUDGE GREGORY K. STEWART in Springdale, Washington County, Arkansas.

Claimant represented by EVELYN E. BROOKS, Attorney, Fayetteville Arkansas.

Respondents represented by RANDY P. MURPHY, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

On May 12, 2021, the above captioned claim came on for hearing at Springdale, Arkansas. A pre-hearing conference was conducted on December 9, 2020, and a pre-hearing order was filed on that same date. A copy of the pre-hearing order has been marked as Commission's Exhibit #1 and made a part of the record without objection.

At the pre-hearing conference the parties agreed to the following stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.
2. The employee/employer/carrier relationship existed between the parties at all relevant times.
3. The claimant sustained a compensable injury to his low back on March 9, 2018.
4. The claimant was earning sufficient wages to entitle him to compensation at

the maximum rates.

At the pre-hearing conference the parties agreed to litigate the following issues:

1. Claimant's entitlement to additional medical treatment.
2. Claimant's entitlement to temporary total disability benefits from April 26, 2019 through a date yet to be determined.
3. Attorney's fee.

At the time of the hearing, the respondent agreed that claimant can return to either Dr. Deimel or Dr. Armstrong for additional medical treatment for his compensable low back injury. Therefore, additional medical treatment is not an issue, claimant may return to either Dr. Deimel or Dr. Armstrong.

The claimant contends that he is entitled to additional medical treatment and to temporary total disability benefits from April 26, 2019 to a date yet to be determined, as well as an attorney's fee. Claimant reserves all other issues.

The respondents contend that all benefits to which claimant is owed have been paid. Respondents further contend that claimant was terminated for reasons unrelated to the work-related injury.

From a review of the record as a whole, to include medical reports, documents, and other matters properly before the Commission, and having had an opportunity to hear the testimony of the witnesses and to observe their demeanor, the following findings of fact and conclusions of law are made in accordance with A.C.A. §11-9-704:

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The stipulations agreed to by the parties at a pre-hearing conference conducted

on December 9, 2020 and contained in a pre-hearing order filed that same date are hereby accepted as fact.

2. Claimant has failed to meet his burden of proving by a preponderance of the evidence that he is entitled to temporary total disability benefits beginning April 26, 2019 and continuing through a date yet to be determined.

FACTUAL BACKGROUND

Claimant is a 51-year-old man who began working for respondent on November 12, 2015. Respondent is a company that provides uniforms, towels, aprons, mats, etcetera, to various companies. Claimant was employed as a Route Sales Representative and he was responsible for delivering clean items to customers and picking up dirty items for return.

The parties have stipulated that claimant suffered a compensable injury to his low back on March 9, 2018, when he was pulling a cart of dirty laundry off of his truck. This injury occurred on Friday and over the weekend claimant's condition worsened. Claimant initially sought medical treatment on his own from MediServe before respondent sent him to Dalana Rice, ARNP, at Arkansas Occupational Health Clinic for treatment. Rice diagnosed claimant with low back pain, radiculopathy, and paresthesia. Her treatment included physical therapy, over the counter medications, heat, and ice.

Rice also released claimant to return to work with restrictions of lifting to 10 pounds or less with limited bending and twisting. Claimant did return to work for respondent and was assigned an employee to ride with him in the running of his daily routes. Claimant would perform the driving and paperwork while the other employee did the physical work

of loading and unloading.

When claimant's condition did not improve with treatment, Rice ordered an MRI scan which according to her report of June 1, 2018 revealed mild degenerative changes of the lumbar spine without disc herniations and moderate left neural foraminal stenosis at L3-4 and L4-5. At some point the claimant was referred to Dr. George Deimel, orthopedist, at Ozark Orthopedics for treatment. On August 27, 2018 Dr. Deimel gave claimant a lumbar epidural steroid injection at the L3-4 and L4-5 levels. In his report of September 11, 2018, Dr. Deimel indicated that the injection provided complete resolution of claimant's pain for the first few hours, but over the last two weeks the pain had returned to its pre-injection baseline. Dr. Deimel discussed various options with the claimant, including the possibility of surgery. A decision was made at that time to continue treatment with a combination of medication, physical therapy, and a second injection which was performed on September 25, 2018. Dr. Deimel also continued claimant on light-duty work.

On October 9, 2018, Dr. Deimel stated:

I told Mr. Rogers that we were at a point that either he just is going to have to learn to live with the pain or we have to consider other more aggressive treatment options. He states that there is some pain that is present, that also seems to be different from his lumbosacral radicular pain. He localized this to the lateral aspect of the hip.

Based upon those complaints, Dr. Deimel recommended an EMG/NCS of claimant's left lower extremity. In his report of November 29, 2018, Dr. Deimel noted that claimant's EMG was normal with no evidence of left lower extremity lumbar radiculopathy, plexopathy, mononeuropathy, or peripheral polyneuropathy. At that point, Dr. Deimel

recommended a bursa injection which he provided.

On January 3, 2019, Dr. Deimel noted that there were no significant changes following the bursa injection on November 29. He again indicated that he discussed surgical options with claimant, but informed him that based on the findings of the MRI scan and the level of pain he might not necessitate surgery. Dr. Deimel prescribed new medication to claimant and continued his work status of light duty with less than 10 pounds of lifting and avoiding repetitive bending.

In his report of March 7, 2019, Dr. Deimel noted that claimant had sustained no improvement and recommended that claimant undergo an updated MRI scan and be seen by Dr. Shepherd for a surgical consultation. The claimant underwent a second lumbar MRI scan on March 15, 2019, which again revealed mild degenerative changes and stenosis at the L3-4 and L4-5 levels.

Following the MRI scan claimant was evaluated by Kelsey Harper, PA, at Northwest Arkansas Neuroscience Institute. Harper diagnosed claimant as suffering from left hip pain, sacroiliitis, and acute low back pain. She recommended physical therapy as well as injections in the claimant's SI joint. She also indicated that she had discussed claimant's imaging and his case with Dr. Shepherd who agreed with the plan. The left sacroiliac joint injection was given by Dr. Deimel on April 26, 2019.

Claimant returned to Dr. Deimel on May 16, 2019, and he noted that claimant had received no significant relief from the sacroiliac joint injection. Dr. Deimel also noted that claimant had a reproduction of significant groin and buttock pain with hip provocative maneuvers and as a result, he believed that claimant might suffer from a possible hip labral tear. As a result, he ordered an MRI scan of claimant's left hip which was performed

on May 28, 2019, and revealed no evidence of a labral tear.

In his report of January 9, 2020, Dr. Deimel recommended that claimant be evaluated by Dr. Armstrong for possible surgical intervention. Subsequent to that date claimant was again evaluated by Harper, who in a report dated March 3, 2020, indicated that claimant's pain most consistently fit an L5 radiculopathy. She recommended a new MRI scan as well as physical therapy. Medical records indicate that claimant began physical therapy on March 10, 2020, at Exceed Physical Therapy and continued through April 9, 2020. The April 9, 2020 report states that claimant has no significant change in his pain since beginning physical therapy; therefore, claimant was discharged.

The last medical report is dated March 19, 2020, and is a lumbar MRI scan which revealed mild canal stenosis at L3-4 due to a mild disc bulge; epidural lipomatosis at L4-5 which creates mild canal stenosis; as well as moderate left neuroforaminal narrowing at L3-4 and L4-5. As previously mentioned, respondent is in agreement that claimant can return to either Dr. Deimel or Dr. Armstrong for additional medical treatment for his compensable injury.

As previously discussed, claimant returned to work for respondent with restrictions placed upon him by his treating physicians. This primarily included a 10-pound lifting restriction. As also noted, claimant was given another employee to ride with him and perform the physical lifting required in the running of his daily route. Claimant continued to perform his job in this manner until he was terminated by respondent on April 25, 2019. Claimant has filed this claim contending that he is entitled to temporary total disability benefits beginning April 26, 2019, and continuing through a date yet to be determined.

ADJUDICATION

The issue in this case is claimant's request for temporary total disability benefits beginning April 26, 2019 and continuing through a date yet to be determined. April 26 is the day after claimant was terminated by respondent. Much of the testimony in this claim at the hearing and through depositions involves claimant's termination by respondent. Respondent terminated claimant after receiving various complaints, including complaints of sexual harassment, from three different companies on claimant's route. In response, claimant denies those accusations as detailed in his testimony.

Despite the evidence which was presented with regard to claimant's termination, in order to be entitled to temporary total disability benefits for an unscheduled injury, claimant has the burden of proving by a preponderance of the evidence that he remains within his healing period for his compensable injury and that he suffers a total incapacity to earn wages. *Arkansas State Highway & Transportation Department v. Breshears*, 272 Ark. 244, 613 S.W. 2d 392 (1981).

Here, while claimant does remain within his healing period given Dr. Deimel's referral to Dr. Armstrong as well as Harper's report of March 3, 2020, I do not find that claimant has proven that he suffers a total incapacity to earn wages.

Since the time of claimant's initial medical treatment with Rice at the Arkansas Occupational Health Clinic, claimant has been released to return to work with restrictions by his various treating physicians. Initially, this was Rice. Claimant subsequently came under the care of Dr. Deimel, orthopedist, and Dr. Deimel was also of the opinion that claimant could continue working with restrictions of lifting less than 10 pounds avoiding repetitive bending. In fact, a return to work note from Dr. Deimel dated March 13, 2019,

approximately six weeks prior to claimant's termination, indicated that claimant should continue his light duty work restrictions. In addition, a work note from Thurman Smith, PA-C at Ozark Orthopedics, dated April 22, 2019 indicates that claimant should continue his work restrictions of light duty with less than 10 pounds of pushing, pulling, gripping, or carrying.

Most importantly, Dr. Deimel addressed the claimant's ability to return to work in response to various inquiries. In a letter dated July 17, 2019, Attorney Murphy asked three questions, including the following:

Since Mr. Rogers continued working until he was terminated on April 26, 2019, do you have any basis for keeping him off work based on your exam and diagnostic studies?

In response to that question, Dr. Deimel handwrote "continue work."

Dr. Deimel again addressed this issue in a report dated August 5, 2019. Dr. Deimel indicated that he was writing this report in response to questions which had been raised by both Attorney Brooks and Attorney Murphy regarding claimant's work status and recommendations for treatment. In that report, Dr. Deimel stated:

There are no objective findings based on the new diagnostic studies that would suggest Mr. Rogers should continue off work. He was continuing to work, albeit with persistent left hip pain, in the setting of his initial work comp injury. If he was evaluated clinically, we would have him continue at his previously assigned work status. (Emphasis added.)

Thus, according to Dr. Deimel, there is no basis that claimant should continue off work. Instead, claimant had been released to return to work at his previously assigned work status.

Accordingly, based upon the opinion of Dr. Deimel that there is no reason that claimant should continue off work, I find that claimant has failed to meet his burden of proving by a preponderance of the evidence that he suffers a total incapacity to earn wages as a result of his compensable injury. Per Dr. Deimel, the claimant was capable of returning to work at light duty with no lifting more than 10 pounds. Even though claimant had been terminated by respondent, he was capable of returning to work for another employer within the restrictions imposed upon him by Dr. Deimel. Therefore, I find that claimant has failed to prove by a preponderance of the evidence that he suffered a total incapacity to earn wages and that he is entitled to temporary total disability benefits beginning April 26, 2019 and continuing through a date yet to be determined.

ORDER

Claimant has failed to prove by a preponderance of the evidence that he is entitled to temporary total disability benefits beginning April 26, 2019, and continuing through a date yet to be determined. Therefore, his claim for compensation benefits is hereby denied and dismissed.

Respondent is responsible for paying the court reporter her charges for preparation of the hearing transcript in the amount of \$986.05.

IT IS SO ORDERED.

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE