
**APPEALS BOARD
UTAH LABOR COMMISSION**

JOSE R. HERNANDEZ,

Petitioner,

vs.

**LOW BOOK SALES and TWIN CITY
FIRE INSURANCE COMPANY,**

Respondents.

**ORDER ON MOTION
FOR REVIEW**

Case No. 05-0104

Petitioner Jose R. Hernandez and Respondents, Low Book Sales and Twin City Fire Insurance Company, (referred to jointly as “Low Book” hereafter) ask the Appeals Board of the Utah Labor Commission to review Administrative Law Judge Sessions' decision regarding Mr. Hernandez’s claim for benefits under the Utah Workers' Compensation Act, Title 34A, Chapter 2, Utah Code Annotated.

The Appeals Board exercises jurisdiction over this motion for review pursuant to § 63G-4-301 of the Utah Administrative Procedures Act and § 34A-2-801(3) of the Utah Workers’ Compensation Act.

BACKGROUND AND ISSUE PRESENTED

Mr. Hernandez claims workers’ compensation benefits from Low Book for injuries to his back, arms, neck and left shoulder allegedly caused by a work-related accident at Low Book on May 27, 2004. Judge Sessions held an evidentiary hearing and then appointed an impartial medical panel to evaluate the medical aspects of Mr. Hernandez’s claim. Based on the panel’s report, Judge Sessions concluded that Mr. Hernandez was eligible for certain specified disability compensation and medical benefits, as well as travel expenses and interest.

Mr. Hernandez’s motion for review contends that, based on his earnings at Low Book, he is entitled to a higher weekly compensation amount. For its part, Low Book argues that Mr. Hernandez is not entitled to any temporary disability compensation and that Mr. Hernandez’s medical benefits should be limited to medical care for his back and should not extend to medical care for his arms, neck and left shoulder.

FINDINGS OF FACT

The Commission finds the following facts material to the issues raised by the parties’ respective motions for review.

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Prior to the accident that gave rise to Mr. Hernandez's claim for benefits, he worked 75 hours per week for Low Book at a base wage of \$7 per hour, resulting in weekly earnings of \$647.50 including overtime pay.

On May 27, 2004, Mr. Hernandez experienced acute back pain after moving three cement blocks. Based on the medical panel's report, the Appeals Board finds that Mr. Hernandez suffered a lumbar disc injury as a result of his work exertion. The lumbar injury prevented Mr. Hernandez from performing the regular duties of his pre-injury work, but it appears that Mr. Hernandez continued to work for Low Book on a light-duty basis until December 19, 2004. Mr. Hernandez reached medical stability from the lumbar injury by January 30, 2005, and was left with a permanent 3% whole person impairment from the injury.

Mr. Hernandez's arm, neck and left shoulder injuries were not medically caused by his work at Low Book.

DISCUSSION AND CONCLUSIONS OF LAW

As a preliminary matter, the Appeals Board notes that Mr. Hernandez's overtime pay should be considered in determining the amount of Mr. Hernandez's weekly disability compensation. It is apparent that Judge Sessions failed to include such overtime pay in his computations. The Appeals Board will correct that error as part of the Appeals Board's order, below. The Appeals Board now turns to the issues raised in Low Book's motion for review.

First, Low Book contends that Judge Sessions erred in awarding 6.286 weeks of temporary total disability compensation to Mr. Hernandez. Section 34A-2-410(1)(a) of the Utah Workers' Compensation Act, which establishes the right of injured workers to temporary total disability compensation, provides that "in case of temporary disability, so long as the disability is total, the employee shall receive (compensation)" This provision must be interpreted in light of two decisions by the Utah Supreme Court. In *Entwistle Co. v. Wilkins*, 626 P.2d 495, 498 (Utah 1981), the Court held that an injured worker's temporary disability "may be found to be total if he can no longer perform the duties of the character required in his occupation prior to his injury." In *Booms v. Rapp*, 720 P. 2d 1363, 1366 (Utah 1986), the Court ruled that "once a claimant reaches medical stabilization, the claimant is moved from temporary to permanent status and he is no longer eligible for temporary benefits."

Mr. Hernandez's lumbar injury prevented him from performing the strenuous labor that his work had required before the accident. Consequently, his presumptive right to temporary total disability compensation began at the time of his accident and continued until he reached medical stability on January 30, 2005.

Mr. Hernandez's right to temporary total disability compensation is described as "presumptive" because another statutory provision, § 34A-2-410(2), allows an employer to avoid

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paying temporary total disability compensation by providing light-duty work for the injured worker. Subsection 410(2) states:

In the event a light duty medical release is obtained prior to the employee reaching a fixed state of recovery, and when no light duty employment is available to the employee from the employer, temporary disability benefits shall continue to be paid.

Subsection 410(2) establishes two conditions that must be met before an employer is excused from paying temporary total disability compensation. First, the injured worker must have a medical release to perform some type of light duty work. Second, the employer must make such light duty work available to the injured worker. While it is undisputed that Mr. Hernandez had a medical release for light duty work, thereby satisfying the first part of subsection 410(2), it appears that Low Book did not make light duty work available to Mr. Hernandez after December 19, 2004, thereby triggering the provision of subsection 410(2) that “when no light duty employment is available to the employee from the employer, **temporary benefits shall continue to be paid.**” (Emphasis added.) The Appeals Board therefore concludes that Mr. Hernandez is entitled to temporary total disability compensation from December 19, 2004, until January 30, 2005.

Finally, Low Book contends that Judge Sessions erred in ordering Low Book to pay the cost of medical care Mr. Hernandez received between December 19, 2004, and January 30, 2005. Based on the medical panel’s report, which concluded that Mr. Hernandez’s problems with his arms, neck and shoulder were not caused by his work, the Appeals Board concludes that Low Book is not liable for the costs of medical care for those conditions.

ORDER

The Appeals Board modifies Judge Sessions’ order, found at page seven of his decision, as follows:

Mr. Hernandez is awarded temporary total disability compensation at the rate of \$431 per week from December 19, 2004, until January 30, 2005, in the principal amount of \$2,709.27, plus interest at 8% per annum from the date each payment of such compensation was due.

Mr. Hernandez is awarded permanent partial disability compensation for a permanent 3% whole person impairment in the principal amount of \$3,669.12, plus interest at 8% per annum from the date each payment of such compensation was due.

From the foregoing sums, Low Book shall deduct 25% and pay that amount directly to Mr. Hernandez’s attorney, Maximo R. Guerra, Esq. as attorney’s fees.

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Mr. Hernandez is awarded the reasonable cost of medical care necessary to treat only his lumbar injury, as determined according to the medical and surgical fee schedule set forth in the Commission's Rule R612-2-13, plus interest at 8% per annum from the date of billing until paid.

Mr. Hernandez is awarded travel costs as authorized by the Labor Commission's Rule R612-2-20, Utah Administrative Code.

It is so ordered.

Dated this 28th day of May, 2009.

Colleen S. Colton, Chair

Patricia S. Drawe

Joseph E. Hatch

NOTICE OF APPEAL RIGHTS

Any party may ask the Appeals Board of the Utah Labor Commission to reconsider this Order. Any such request for reconsideration must be received by the Appeals Board within 20 days of the date of this order. Alternatively, any party may appeal this order to the Utah Court of Appeals by filing a petition for review with the court. Any such petition for review must be received by the court within 30 days of the date of this order.