

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F303720

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| PATRICK DALEY, Employee | CLAIMANT |
| EXCELL PLUMBING, Employer | RESPONDENT |
| UNION STANDARD INSURANCE CO., Carrier | RESPONDENT |

OPINION FILED NOVEMBER 14, 2003

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

Claimant represented by JAY TOLLEY, Attorney, Fayetteville, Arkansas.

Respondents represented by WILLIAM FRYE, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

On October 22, 2003, the above captioned claim came on for a hearing at Springdale, Arkansas. A pre-hearing conference was conducted on June 4, 2003, and a pre-hearing order was filed on June 5, 2003. A copy of the pre-hearing order has been marked 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 relationship of employee-employer-carrier existed among the parties on April 1, 2003.
3. The respondent has controverted this claim in its entirety.

At the time of the hearing the parties agreed to stipulate that claimant earned an average weekly wage of \$480.00 which would entitle him to compensation at the rates of \$320.00 for temporary total disability benefits and \$240.00 for permanent partial disability benefits.

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

1. Compensability of injury to claimant's back, neck, arms, and shoulders.
2. Temporary total disability benefits from April 2, 2003 through a date yet to be determined.
3. Medical.
4. Attorney fee.

The claimant's contentions as set forth in his pre-hearing questionnaire are as follows: "Claimant was told to jump up on a tractor that began moving on its own in effort to stop it. He injured his back, neck, arms, and shoulders. We contend he is entitled to TTD, medical, and attorney fees as a result of these injuries."

At the time of the pre-hearing conference respondent was contending in part that claimant was not performing employment services at the time of the incident on April 1, 2003. However, that is no longer the respondent's contention; instead, respondent contends that claimant did not meet his burden of proving by a preponderance of the evidence that he suffered a compensable 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 the pre-hearing conference conducted on June 4, 2003, and contained in a pre-hearing order filed June 5, 2003, are hereby accepted as fact.
2. The parties' stipulation that claimant earned an average weekly wage of \$480.00 which would entitle him to compensation at the rate of \$320.00 for temporary total disability benefits and \$240.00 for permanent partial disability benefits is also hereby accepted as

fact.

3. Claimant has failed to prove by a preponderance of the evidence that he suffered a compensable injury to his back, neck, arms, or shoulders while employed by the respondent.

FACTUAL BACKGROUND

The claimant is a 39 year old high school graduate who went to work for the respondent in November 2001. Claimant was not a plumber, but instead performed various job duties primarily in the claimant's shop. These duties included the maintenance of the building, tools, trucks, and inventory. In addition, claimant also loaded and unloaded trucks.

The claimant's father is the owner of some land which he leased to Robert Martin, the owner and president of the respondent. On April 1, 2003, claimant was instructed by Martin to go to the rented property and brush-hog the horse pasture. Claimant testified that after he finished brush-hogging, he got off the tractor and started walking toward his father and Martin when the tractor started moving on its own. As a result, claimant ran and jumped on the tractor to stop it. Claimant testified that as he stopped the tractor, it nudged against a tree. According to claimant's testimony he then got off the tractor, finished his conversation with his father and Martin, put the tractor up and went home.

That night while at home the claimant began developing pain and stiffness in his shoulder and neck area. Claimant went to work for the respondent the next day on April 2, 2003, but informed respondent that he was going to take a couple of days off from work and perhaps seek medical treatment. Claimant eventually sought medical treatment at the emergency room of Bates Medical Center in Bentonville. Since that visit claimant has sought medical treatment on several other occasions and has now filed this claim contending that he suffered a compensable injury to his back, neck, arms, and shoulder

as a result of the incident on April 1, 2003.

ADJUDICATION

Claimant contends that he suffered compensable injuries to various parts of his body as a result of a specific incident which occurred on April 1, 2003. The Commission has stated in *Henry Weaver v. Precision Packaging*, Full Commission Opinion filed February 2, 1995 (E400880), that pursuant to Act 796 of 1993, the following must be shown in order to establish the compensability of an injury occurring after July 1, 1993:

- (1) proof by a preponderance of the evidence of an injury arising out of and in the course of his employment;
- (2) proof by a preponderance of the evidence that the injury caused internal or external physical harm to the body which required medical services or resulted in disability or death;
- (3) medical evidence supported by objective findings, as defined in Ark. Code Ann. §11-9-102(16), establishing the injury;
- (4) proof by a preponderance of the evidence that the injury was caused by a specific incident and is identifiable by time and place of occurrence.

After reviewing the evidence in this case impartially, without giving the benefit of the doubt to either party, I find that claimant has failed to meet his burden of proving by a preponderance of the evidence that he suffered a compensable injury while employed by the respondent.

Initially, it is important to note that claimant has a history of physical complaints similar to those for which he now seeks compensation benefits. According to claimant's testimony, he began having low and mid back problems approximately fifteen years ago.

Indeed, at one point the claimant was off work for approximately one year. Claimant testified that since that time he has had occasional back pain off and on.

In addition, in May 2001, the claimant was involved in a motor vehicle accident.

Claimant testified that as a result of that accident he developed muscle spasms in his neck, had a limited range of motion, right shoulder pain, and mid and low back pain. Claimant also testified that as a result of that accident he was unable to work for a period of time. Claimant admitted that as a result of that accident he had complained to Dr. Arnold of neck pain and numbness radiating into his fingers on the right side. As a result of that motor vehicle accident, the claimant continued to take medication, including Vicodin up to April 2003.

The claimant was involved in a second motor vehicle accident on December 23, 2001. Claimant testified that at that time he had neck stiffness, mid back stiffness, and right shoulder stiffness. In addition, claimant also complained of numbness on the left side, especially into the long and index fingers of his left hand. An MRI scan taken at the request of Dr. Dickinson revealed a herniated disc at the C6-7 level.

Importantly, claimant admitted that prior to April 2003 he still had occasional problems with his neck, back, and arms. Claimant testified that he would occasionally take Vicodin at night and Tylenol and Ibuprofen during the day.

Turning to the incident in question, I note that based upon the testimony of both claimant and Robert Martin, the owner and president of respondent, that the incident appears to have been relatively minor in nature. As previously noted, claimant testified that once he got off the tractor on April 1 he began walking toward his father and Robert Martin. As he was doing so, he saw a reaction from his father and Martin which caused him to turn around. When he did so, he noticed that the tractor was moving on its own, ran to jump on it and stopped the tractor. Claimant attributed his strain to getting up on the tractor. However, claimant admits that the tractor was not moving very fast when he jumped on it. In fact, claimant testified "It might have been going a couple of miles an hour." Claimant also testified that the tractor had moved only a couple of feet before he got back on it. With respect to the tractor coming to rest against a tree, claimant testified

that there was no damage to the tree or tractor as the result of this incident.

While Martin's testimony was essentially the same he did not recall the tractor hitting any tree. Martin testified that claimant had to move some eight to ten feet to get back on the tractor which he estimated was moving at most one to two miles an hour.

Most importantly, claimant admitted that he did not notice any severe pain or sensation at the time this incident occurred. For that reason, claimant did not mention any injury to his father or to Martin. In fact, claimant admitted that it was not until approximately 10 o'clock that night when he was sitting at home that he began feeling some pain in his shoulder. At the hearing claimant confirmed his deposition testimony that he related the pain to the incident with the tractor because that was the work he had been performing that day.

As previously noted, claimant returned to work for the respondent the next day, April 2, 2003. Martin testified that he knew on that date that claimant was in pain. Martin testified that when he asked claimant the cause of his pain claimant informed him that he was unsure if the pain was due to the tractor incident the day before or to his prior back problems. Two days later on April 4, 2003, claimant sought medical treatment from the emergency room informing the personnel of both his prior back problems and the incident with the tractor.

In summary, in order to prove a compensable injury, claimant has the burden of proving by a preponderance of the evidence that his physical problems are causally related to his employment with the respondent. Here, claimant contends that his physical problems are causally related to the tractor incident on April 1, 2003. I find insufficient evidence supporting that contention. First, the evidence indicates that claimant has a longstanding history of back and neck pain for which he continued to take medication in April 2003. Claimant testified that he would take Vicodin at night on occasion and Tylenol and Ibuprofen during the day. Claimant testified that he also attempted to limit heavy

lifting in order to avoid re-injury. Furthermore, the incident which did occur on April 1, 2003 appears to be relatively minor in nature. Claimant only had to go some eight to ten feet to get back on the tractor which was moving approximately one to two miles an hour. Although claimant testified that the tractor came to rest against a tree, he does not attribute his pain to that, but rather to climbing on board the tractor. However, claimant testified that he did not have any severe pain or sensation at that time and therefore did not report any injury to his father or to Robert Martin. It was not until claimant was sitting at home that night at approximately 10:00 p.m. that he began having pain in his shoulder. Claimant attributed that pain to his work activities that day because that was the work he had performed. Given this evidence, I find that claimant has failed to meet his burden of proving by a preponderance of the evidence that he suffered a compensable injury which arose out of and in the course of his employment with the respondent.

ORDER

Claimant has failed to prove by a preponderance of the evidence that he suffered a compensable injury which arose out of and in the course of his employment with the respondent. Therefore, his claim for compensation benefits is hereby denied and dismissed.

IT IS SO ORDERED.

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE