

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIMS NUMBER F108229 & F109987

KIRK E. GRAY, EMPLOYEE	CLAIMANT
ACME BRICK CO., EMPLOYER	RESPONDENT
ST. PAUL FIRE & MARINE INSURANCE COMPANY, INSURANCE CARRIER	RESPONDENT
HOT SPRING COUNTY OFFICE OF CHILD SUPPORT ENFORCEMENT	INTERVENOR
HEMPSTEAD COUNTY OFFICE OF CHILD SUPPORT ENFORCEMENT	INTERVENOR

OPINION FILED DECEMBER 3, 2003

Hearing conducted December 1, 2003, before Administrative Law Judge Richard B. Calaway in Malvern, Hot Spring County, Arkansas, with

Mr. M. Keith Wren, Attorney at Law, Little Rock, Arkansas, appearing for the claimant and

Mr. Joseph E. Kilpatrick, Jr., Attorney at Law, Little Rock, Arkansas, appearing for the respondents.

STATEMENT OF THE CASE

This is a dispute over whether the claimant's neck surgery of August, 2001, was necessitated by a compensable 1999 injury, or the result of an independent intervening cause that occurred in April, 2001.

The claimant contended that the 2001 surgery was necessitated by compensable neck injuries occurring in October and November, 1999, and that he should be awarded related benefits, including medical expenses and permanent anatomical impairment, properly rated at 10% by Dr. Wilbur Giles. An attorney's fee for controversion was also requested. Other possible issues were reserved.

The respondents denied that the surgery and associated benefits were attributable to compensable neck injuries. Specifically, they contended that the claimant suffered only a single compensable injury to his neck on or about November 29, 1999, and they denied that he had a previous neck injury on or about October 1, 1999. They further contended that he returned to work following his 1999 injury and continued to work, without complaint, until September 22, 2000, when he resigned and went on to work for different employers. They also contended that on April 20, 2001, months after he had resigned, he suffered a new injury at home while mowing the yard, and that this injury necessitated the August, 2001, surgery which, in turn, gave rise to his temporary total disability and permanent impairment.

The parties acknowledged that payment of indemnity benefits is subject to claims for past due child support filed by Hempstead County in the amount of \$11,293.81 and Hot Spring County in the amount of \$3,636.87. Additionally, Mr. H. Dale Grady, Attorney at Law, who had previously intervened for the purpose of asserting an attorney's lien in the amount of \$30.00, has withdrawn that claim and has been dismissed as an Intervenor.

Based upon the record as a whole, and without giving the benefit of the doubt to any party, as required by the Act, the following findings of fact and conclusions of law are hereby made:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of the parties and subject matter of this claim.
2. Pursuant to the stipulations of the parties and the record, the employment relationship existed at all pertinent times; the claimant sustained a compensable injury to his neck on or about November 29, 1999; and his average weekly wage was \$429.00.

3. The preponderance of the evidence fails to show that the claimant sustained a compensable injury on or about October 1, 1999.

4. The preponderance of the evidence shows that the claimant's August, 2001, surgery was reasonably necessary in connection with his compensable injury and was not the result of an independent intervening cause.

5. As a result of his compensable injury, the claimant has sustained permanent anatomical impairment in the amount of 10% to the body as a whole, consistent with the rating of Dr. Wilbur Giles.

6. The respondents have controverted the payment of benefits hereinafter awarded and the claimant's attorney is entitled to the maximum statutory attorney's fee thereon, payable one-half by the claimant and one-half by the respondents.

DISCUSSION

The claimant, 29 years of age at the time of the hearing and a high school graduate, began working for Acme Brick Company in 1997 as a blending room operator, a position which required him to combine mixes of clay and additives in order to produce different colors for bricks manufactured by the facility. On cross-examination, he admitted that this job was "pretty easy" and was primarily pushing buttons on machines, sweeping up, and occasionally operating a forklift.

The claimant testified that he first hurt his neck while trying to get parts for an old forklift when he had to step up into a fenced-in area with "low clearance," bumped his head, and was knocked unconscious. He stated that he never saw a doctor and never lost time from work, but that his neck got stiff. He said he was not fully recovered from this incident when he hurt his neck in November, 1999.

The claimant testified that on November 29, 1999, while backing up on a forklift and looking over his shoulder, something snapped and he felt pain down the right side of his body. He told his supervisor, Jimmy Gatlin, who started paperwork to establish a workers' compensation claim. He testified that he saw the company doctor, Dr. Ray Bollin, and was given medication and physical therapy. The report of a related MRI scan performed December 8, 1999, described a small central herniated disc at C5-6 and a small herniated disc on the right at C6-7, with mild canal stenosis at both levels. The claimant also said he was having constant agonizing right side, neck, and shoulder pain, which was helped some by physical therapy, but that he has continued to hurt. He also stated that while he was on medication he did light duty work until the end of December, 1999, and during that time he was sometimes allowed to sleep at work. He further testified that he did return to full duty work around the end of December, 1999, and worked until September, 2000, when he resigned in order to become a truck driver. He stated that he was constantly achy and stiff but did not have the agonizing pain as he had originally experienced.

When he resigned in September, 2000, he attended truck driving school and then in November, 2000, went to work for Ozark Motor Lines. He stated that his neck continued to be stiff at that time. However, he did not seek treatment for neck problems from December, 1999, until April, 2001, after an incident that occurred while he was mowing his yard, even though he did consult doctors for other problems during that time.

The claimant testified that when he was mowing his yard in April, 2001, he began to experience numbness in his right leg and kneeled down a little bit, to avoid falling, and then caught himself with his arms outstretched and his palms forward. He said that pretty quickly after this incident he began to have increased pain in his neck and he consulted Dr. Tilley who had an

additional MRI scan performed. The report of that MRI indicated that the claimant had a small central bulging disc at C5-6 without significant impingement and a larger right herniated nucleus pulposus at C6-7 with extension into the right neural foramen causing some nerve root impingement and that this was slightly more prominent than on the prior study.

The claimant was ultimately referred to neurosurgeon Dr. Wilbur Giles who performed surgery August 14, 2001, and later assessed his permanent impairment at 10% in a letter dated April 24, 2003. In his deposition of August 6, 2003, Dr. Giles testified that he has practiced neural surgery for 32 years, had performed over 16,000 surgeries similar to the one performed on the claimant and, in his experience, about 70% of people who have injuries similar to the claimant's 1999 injury eventually need the surgery the claimant received. Dep. at 15. He described the surgery performed on the claimant as an anterior cervical decompression fusion which involved removing discs at C5-6 and C6-7 and performing bone grafts at both levels. Dep. at 7. He also testified that the surgery related to the same two discs that were involved in the 1999 incident and that by the time he saw the claimant the discs at C6-7 was an overt herniation, "completely blown from the space." Dep. at 8. It was his opinion that the discs injured in 1999 were both significantly protruded and that the claimant subsequently reinjured a pre-existing lesion, which overtly herniated. Dep. at 11. In short, his testimony indicated that the claimant's 1999 injury required surgery as a result of the incident in April, 2001.

The respondents oppose the benefits requested by the claimant, first asserting that he did not have a compensable injury in October, 1999. As to that injury, the claimant's burden of proof includes establishing the existence of a compensable injury by medical evidence, supported by objective findings. Ark. Code Ann. §11-9-102(4)(D). However, as the claimant testified, he did not

seek medical attention until after the November injury and, for that reason, there is no medical record, supported by objective findings, that might establish the existence of a compensable injury and permit the claimant to meet his burden. Thus, the preponderance of the evidence fails to show that the October, 1999, incident resulted in a compensable injury, within the meaning of the Act.

Nevertheless, the claimant's surgery and associated benefits may be the responsibility of the respondents if sufficiently related to the admittedly compensable injury of November 19, 1999. Under the Act, where a compensable injury has been established, the employer is required promptly to provide such medical and related services as may be reasonably necessary in connection with the injury. Ark. Code Ann. §11-9-508. Moreover, when the primary injury has been shown to be compensable, the employer is responsible for any consequence that naturally flows from it, the fundamental test being whether a causal connection exists between the primary injury and the subsequent consequence. See, e.g., Bearden Lumber Co. v. Bond, 7 Ark. App. 65 (1983).

However, the respondents point to the April, 2001, lawn mowing incident as the cause of the claimant's need for surgery and related benefits, including his impairment rating. In that regard, Ark. Code Ann. §11-9-102(4)(F)(iii) provides that benefits are not payable for a condition which results from a nonwork-related independent intervening cause following a compensable injury which caused or prolonged disability or a need for treatment and that such an intervening cause does not require negligence or recklessness on the part of the claimant. In Davis v. Old Dominion Freight Line, Inc., 341 Ark. 751 (2000), it was held that this provision leaves intact the requirement that the intervening cause be the result of unreasonable conduct on the part of the claimant. Thus, for an independent intervening cause to relieve the respondents of responsibility for additional benefits, the

incident must be the result of the claimant's unreasonable activity and must cause or prolong disability or a need for treatment.

Here, the claimant had been released to full duty work and had worked without complaint for the employer and subsequent employers. Although he was continuing to have aches and pain in his neck and shoulders he had not found it necessary to return to the doctor for treatment. There is no indication that the doctor had warned him against activities such as mowing his yard so that such an activity might be considered unreasonable.

Thus, while the lawn mowing incident did contribute to the claimant's need for surgery, it was not an independent intervening cause arising from unreasonable activity, so that the respondents might be relieved of their additional responsibilities. Moreover, the testimony of Dr. Giles sufficiently related the claimant's anatomical impairment and his need for surgery to the 1999 injury which the parties recognize as compensable. Under these circumstances, the preponderance of the evidence shows that the claimant is entitled to the benefits requested as a result of his compensable November, 1999, injury at work.

Because the evidence fails to show that the claimant sustained a compensable injury on or about October 1, 1999, claim number F109987 should be, and it is hereby, respectfully denied and dismissed.

AWARD

Pursuant to the foregoing opinion and the law, the respondents are ordered and directed to pay benefits on behalf of the claimant.

This award has been controverted as stated above, and the claimant's attorney is entitled to the maximum statutory attorney's fee on the controverted portion. Pursuant to Coleman v. Holiday

Inn, Ark. WCC No. D708577 (November 21, 1990), the claimant's portion of the controverted attorney's fee is to be withheld from, and paid out of, indemnity benefits, and remitted by separate check by the respondents directly to the claimant's attorney.

Accrued benefits hereinabove awarded shall be paid in lump sum without discount. This award shall bear interest at the maximum legal rate until paid.

IT IS SO ORDERED.

RICHARD B. CALAWAY
Administrative Law Judge