

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F110661

KEITH L. JORDAN

CLAIMANT

PARKER FURNITURE CO., INC.

RESPONDENT EMPLOYER

TRAVELERS

RESPONDENT CARRIER NO. 1

COLUMBIA NATIONAL INSURANCE CO.

RESPONDENT CARRIER NO. 2

ORDER AND OPINION FILED JULY 10, 2003

Hearing before Administrative Law JUDGE LINDA K. MARSHALL.

Claimant represented by the HONORABLE M. SCOTT WILLHITE, Attorney at Law, Jonesboro, Arkansas.

Respondent No. 1 represented by the HONORABLE ROBERT H. MONTGOMERY, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 represented by the HONORABLE ROBERT J. DONOVAN, Attorney at Law, Marianna, Arkansas.

STATEMENT OF THE CASE

The above claim came on for a hearing on May 23, 2003, in Forrest City, Arkansas. A prehearing conference was held on October 9, 2002 and a prehearing order was filed the same date. A copy of the prehearing order was marked as Commission Exhibit No. 1 and admitted into evidence without objection.

At the prehearing conference and prior to the hearing, the parties agreed to the following stipulations:

1. There was an employer-employee relationship on May 8, 2001.
2. The compensation rate is \$157.

3. Travelers Insurance Company was on the risk for this claim from May 1, 1997 through May 1, 2001.

4. Columbia Insurance Company took over coverage for this claim on May 1, 2001 and remains on the risk.

The claimant contends that he was employed with the respondent employer through May 19, 2001 and sustained injuries to his right knee and to his back. The claimant contends he is entitled to medical benefits and temporary total disability benefits from May 19, 2001, to a date to be determined. Permanency is reserved.

Respondent No. 1, Travelers Insurance Company, contends that the claimant did not sustain a compensable knee and back injury while employed with the respondent employer during the period of coverage by Travelers. Alternatively, if the claimant can prove any compensable knee or back injuries, responsibility for these injuries would be with Respondent No. 2. The claim has been controverted in its entirety.

Respondent No. 2, Columbia Insurance Company, contends the claimant cannot meet his burden of proof that he sustained compensable gradual onset injuries, nor can he meet the burden of proof that he sustained specific incident injuries. Alternatively, if the claimant did sustain compensable injuries, Respondent No. 2 contends these injuries were prior to its coverage on May 1, 2001. The claim has been controverted in its entirety.

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 Ark. Code Ann. §11-9-704:

**FINDINGS OF FACT
AND
CONCLUSIONS OF LAW**

1. There was an employer-employee relationship on May 8, 2001.
2. The compensation rate is \$157.
3. Travelers Insurance Company was on the risk for this claim from May 1, 1997, through May 1, 2001.
4. Columbia Insurance Company took over coverage for this claim on May 1, 2001 and remains on the risk.
5. The claimant has failed to prove by a preponderance of the evidence that he sustained a compensable gradual onset knee injury as the result of rapid repetitive activities.
6. The claimant has proven by a preponderance of the evidence that he sustained a gradual onset back injury arising out of and in the course of his employment.
7. The claimant has proven by a preponderance of the evidence that he remained in his healing period and was unable to earn wages from September 21, 2002 to at least March 21, 2002.
8. The respondents are entitled to credit for unemployment benefits that may have been paid during this period pursuant to Ark. Code Ann. §11-9-508.

9. Respondent No. 1 and Respondent No. 2 are both held liable for benefits with their liability apportioned. Respondent No. 1 is apportioned 75% of the expenses and benefits while Respondent No. 2 is apportioned 25% of the expenses and benefits.

DISCUSSION

The claimant, 46 years old, began his employment with the respondent employer in 1981. He delivered furniture, unloaded, loaded and placed furniture in the warehouse or stocked the floor. The type furniture could vary from appliances to end tables or lamps. The claimant worked for the respondent until May 19, 2001. According to the claimant, he had no back or knee problems when he began his employment with the respondent employer. The claimant worked 8 hours a day for a 40-hour week. The claimant testified that a typical week would involve unloading furniture, putting furniture upstairs or on the floor and then making deliveries to customers. According to the claimant, at least one truck of furniture came in each day and sometimes up to three trucks. The claimant had two other co-employees who performed the same type duties.

According to the claimant, he experienced a work injury involving his right knee and he underwent knee surgery about six years ago. According to the claimant, his employer or their insurance paid for the medical associated with the surgery. The claimant recovered and returned to work for the respondent.

The claimant testified that he was having problems with his back and his leg and he sought treatment with Dr. Apurva Dalal in April 2001. In June 2001, Dr. Dalal performed knee surgery. The claimant testified that he has not returned to work because even if he does things around the house like helping move some furniture or

try to cut the grass, or just walk, he has leg pain and must lay down. The claimant testified that he also has low back pain just above his belt line but has not had surgery on his back. According to the claimant, the more he does, the more pain he has in his back and leg.

Under cross examination, the claimant testified that the furniture would usually arrive in boxes and these were unloaded with a two-wheeler or a four-wheeler, not with a forklift. The claimant testified that he would make about 10 deliveries per day. The claimant testified that Dr. Dalal has advised him to avoid heavy lifting. The claimant testified that his knee started hurting him first and that could have been February or March 2001. The claimant's first visit with Dr. Dalal was April 17, 2001. The claimant also confirmed that he is seeing a doctor in West Memphis for his knee and back and is taking prescription medication. The claimant also confirmed that he began drawing unemployment benefits in November 2001. The claimant testified that he does cut two or three yards per week for pay and it takes him three or four hours to do these yards.

Since the claimant in the present claim alleges that he sustained gradual onset injuries, the requirements of Ark. Code Ann. §11-9-102(4)(A)(ii) are controlling and the following requirements must be satisfied:

- (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 the major cause of the disability or need for treatment.

If the claimant fails to establish by a preponderance of the evidence any of the requirements for establishing compensability of the injury alleged, she fails to establish the compensability of the claim and compensation must be denied. See, *Jerry Reed v. ConAgra Frozen Foods*, Full Workers' Compensation Commission Opinion filed February 2, 1995 (E317744).

In the present case, the claimant contends that he sustained a gradual onset knee injury and a gradual onset back injury in the course of and arising out of his employment. In order to prove a compensable gradual onset knee injury, the claimant must prove in addition to the common elements of a compensable gradual onset, that the injury was the result of rapid repetitive motion activities. Ark. Code Ann. §11-9-102(4)(A)(ii)(a).

The test for analyzing whether an injury is caused by rapid repetitive motion is two pronged: (1) the tasks must be repetitive, and (2) the repetitive motion must be rapid. *Malone v. Texarkana Public Schools*, 333 Ark. 343, 969 S.W.2d 644 (1998). The tasks must be repetitive or the rapidity element is not reached; the repetitive tasks must be completed rapidly. *Malone, supra*.

In the present case, the claimant presented testimony regarding his job duties of loading, unloading and delivering furniture as his primary duties. While the testimony was compelling as to his job involving repetitive tasks, it did not present sufficient data to meet the rapid standard. The claimant testified that he unloaded shipment trucks and moved furniture in the store and storage area, as well as delivered furniture;

however, speed of completing tasks was not presented. The claimant did testify that he might make up to 10 deliveries per day but the nature of his work involved travel and then moving furniture into people's homes. After considering the testimony of the claimant and reviewing the medical, I find the claimant has failed to prove by a preponderance of the evidence that he sustained a compensable gradual onset injury to his knee caused by rapid repetitive motion.

The claimant next contends that he sustained a gradual onset back injury. I find the claimant has proven by a preponderance of the evidence that he did sustain a compensable gradual onset back injury arising out of and in the course of his employment. The claimant was a credible witness who had been employed by his employer since 1981. The claimant's job was primarily unloading, loading and delivering furniture. The very nature of the job requires heavy lifting. The claimant treated with Dr. Apurva Dalal, an orthopedic surgeon, and at his May 22, 2003, deposition, Dr. Dalal discussed the June 26, 2001, MRI and related that the diagnostic test revealed disc bulge at L3-4, L4-5 and L5-S1 with no focal herniation. Dr. Dalal last saw the claimant on February 7, 2002. Dr. Dalal wrote an opinion about the claimant on February 17, 2003, and he testified this opinion was based on his examinations between April 17, 2001 and February 7, 2002. In that February 17, 2003, letter, Dr. Dalal opined, in part: "I am certain that the back injury is caused from repeated lifting of heavy weights, which results into degenerative changes in the intervertebral disc. This disease can progress and cause narrowing of the neuroforamina and cause permanent damage to the lumbar spine." Jt. Exh. No. 2.

Dr. Dalal further explained at his deposition:

I personally, in my reasonable opinion, I don't think the bulging disc routinely occurs just because of aging. A bulging disc signifies that there is increased pressure on the vertebral spine to cause pressure on the discs. Because of the constant pressure, it tends to bulge. The long-term effect of that constant pressure on the back is the back becoming degenerated, and in many case the disc does not herniate but simply gets worn down completely, so the two bones are rubbing on each other. (D., p. 23, lines 2-10.)

Dr. Dalal was questioned about the claimant's job:

Q. [Mr. Willhite] Would the fact that he lifts heavy objects at work have any bearing on your opinion on that issue?

A. [Dr. Dalal] Yes. I think anybody who lifts heavy weight, that is more pressure on the spine. It's a simple fact. (D., p. 36, lines 13-16.)

Dr. Dalal was questioned about the "major cause" of the claimant's back problems:

Q. [Mr. Willhite] And just referring to the February 17, 2003, letter that you wrote to me, Doctor, did you have any information at that time regarding what kind of job duties Mr. Jordan had for Parker Furniture? I've got a copy here if you need to review that.

A. [Dr. Dalal] It is my understanding that I was aware that he lifted weights and delivered furniture.

Q. And if you will assume for me, for the purpose of this question, that the term 'major cause' means more than 50 percent, do you have an opinion as to whether Mr. Jordan's work at Parker Furniture was the major cause of his back condition that you saw him for?

A. I would think yes. (D., p. 37, lines 7-19.)

I give great weight to the credible testimony of the claimant that he worked for the same employer for 20 years loading and unloading all types of furniture and appliances and he began over time to experience back pain that became so painful that

he was no longer able to perform his job. The claimant had no back injuries as the results of car wrecks or other activities outside his employment. He sought medical treatment with Dr. Dalal and Dr. Dalal has presented very succinct testimony that the claimant's back injury was caused from repeated lifting of heavy weights, which results in degenerative changes in the intervertebral discs. Dr. Dalal further opined that the major cause of the claimant's back problems was the claimant's heavy lifting job duties at his place of employment. I also give great weight to the opinions given by Dr. Dalal regarding the claimant's medical condition.

I find that the respondents are responsible for all reasonable and necessary medical treatment the claimant has pursued as the result of his compensable back injury.

In the present case, Respondent No. 1, Travelers Insurance Company, was on the risk from May 1, 1997 through May 1, 2001. Respondent No. 2, Columbia Insurance Company, was on the risk from May 1, 2001, to the current date.

Dr. Dalal opined in his deposition that the claimant's back problems were more chronic rather than acute, which goes in favor of a long-term duration rather than a short-term duration. Dr. Dalal would consider a short-term duration problem such as a sudden large herniated disc, fracture or something of that nature. The claimant testified that he last worked for his employer about May 19 or 20, 2001.

In *Collins v. From the Heart, Inc.*, Full Workers' Compensation Commission Opinion, February 2, 1999 (F703473), it held:

In determining whether apportionment should lie among successive carriers, this Commission has previously found that apportionment is appropriate when disability results

from the combined effects of the successive injuries or accumulative trauma while separate entities are providing coverage. See, *Sells v. Corning Nursing Home*, Full Commission Opinion, 3/26/91 (D914840). In *Aetna Insurance Co. v. Dunlap*, 16 Ark. App. 51, 696 S.W.2d 771 (1985), the Arkansas Court of Appeals held that apportionment was proper where a pre-existing disease or anomaly is accelerated or aggravated by a work-related accident. The Court found the second insurer was liable only for the degree of acceleration or aggravation attributed to that accident.

The claimant's testimony in the present case was that his back condition just started worsening and worsening over time with his repeated lifting responsibilities. Dr. Dalal, in his deposition, opined that the claimant's condition was chronic rather than acute. With the claimant's condition being a gradual onset, I find the claimant's compensable injury should be apportioned among Respondent No. 1 and Respondent No. 2. Since Respondent No. 2 was only on the risk a short time, less than one month when the claimant had to take off work, even though the claimant had earlier sought medical treatment, I find that Respondent No. 2 should be apportioned only 25% of the expenses and benefits, while Respondent No. 1 should be apportioned the remaining 75% of expenses and benefits.

The claimant next contends that he is entitled to temporary total disability benefits from May 19, 2001 to a date to be determined. In order to be entitled to temporary total disability benefits, the claimant must remain in his healing period and be totally unable to earn wages. *Ark. State Hwy. & Transp. Dept. v. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981).

In the present case, the claimant left work with both a knee and a back problem. Since I have found the knee condition has not satisfied the requirements for a

compensable gradual onset injury, I will consider only the back injury when looking at entitlement to temporary total disability benefits. After reviewing the medical evidence, the claimant's initial main problem appeared to be his knee condition for which he sought treatment and ultimately had some surgery on September 13, 2001. The claimant thereafter sought treatment and diagnostic testing for his back condition and his testimony is that he has continued to seek treatment with a clinic in West Memphis. The claimant testified that he is unable to perform the lifting requirements of his job. When considering the claimant's credible testimony and the medical evidence, I find the claimant has proven by a preponderance of the evidence that he remained in his healing period for his back condition and unable to work from September 21, 2001 to at least March 21, 2002 (date of the last medical report in evidence).

The claimant testified that he received some unemployment benefits. I find that respondents are entitled to credit for any unemployment benefits that may have been paid during the period of claimant's entitlement to temporary total disability benefits pursuant to Ark. Code Ann. §11-9-508.

ORDER

The claimant has failed to prove by a preponderance of the evidence that he sustained a compensable gradual onset knee injury as the result of rapid repetitive activities. The claimant has proven by a preponderance of the evidence that he sustained a gradual onset back injury arising out of and in the course of his employment. The claimant has proven by a preponderance of the evidence that he remained in his healing period and was unable to earn wages from September 21, 2002 to at least March 21, 2002. The respondents are entitled to credit for any

unemployment benefits that may have been paid during this period pursuant to Ark. Code Ann. §11-9-508. Respondent No. 1 and Respondent No. 2 are both held liable for benefits with their liability apportioned. Respondent No. 1 is apportioned 75% of the expenses and benefits while Respondent No. 2 is apportioned 25% of the expenses and benefits.

The claimant's attorney is entitled to the maximum statutory attorney's fee on benefits awarded herein, one-half of which is to be paid by claimant and one-half to be paid by respondents in accordance with Ark. Code Ann. §11-9-715, *Coleman v. Holiday Inn*, 31 Ark. App. 224, 792 S.W.2d 345 (1990) and *Chamness v. Superior Industries*, W.C.C. E019760 (Opinion filed March 4, 1992).

All sums herein accrued are payable in a lump sum without discount and this award shall bear interest at the maximum legal rate until paid.

IT IS SO ORDERED.

**LINDA K. MARSHALL
ADMINISTRATIVE LAW JUDGE**